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**REPORTS OF CASES**  
**DECIDED IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF NORTH DAKOTA**

**May 21, 1918 to March 15, 1919.**

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**JOSEPH COGHLAN**  
**REPORTER**

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**VOLUME 41**

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**BY JOSEPH COGHLAN, SUPREME COURT REPORTER**

**FOR THE STATE OF NORTH DAKOTA.**

APR 14 1921



**OFFICERS OF THE COURT DURING THE PERIOD OF  
THESE REPORTS.**

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**HON. A. M. CHRISTIANSON, Chief Justice.**

**HON. LUTHER E. BIRDZELL, Judge.**

**HON. RICHARD H. GRACE, Judge.**

**HON. JAMES E. ROBINSON, Judge.**

**HON. H. A. BRONSON, Judge.**

---

**JOSEPH COGHLAN, Reporter.**

**J. H. NEWTON, Clerk.**



## PRESENT JUDGES OF THE DISTRICT COURTS.

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District No. One,  
HON. CHARLES M. COOLEY.

District No. Three,  
HON. A. T. COLE.

District No. Five,  
HON. J. A. COFFEY.

District No. Seven,  
HON. W. J. KNEESHAW.

District No. Nine,  
HON. A. G. BURR.

District No. Eleven,  
HON. FRANK FISK.

District No. Two,  
HON. CHARLES W. BUTTZ.

District No. Four,  
HON. FRANK P. ALLEN.

District No. Six,  
HON. W. L. NUSSLE.

District No. Eight,  
HON. K. E. LEIGHTON.

District No. Ten,  
HON. W. C. CRAWFORD.

District No. Twelve,  
HON. JAMES M. HANLEY.

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▼



## CONSTITUTION OF NORTH DAKOTA.

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**SEC. 101.** Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

**SEC. 102.** It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

## COUNTY COURTS.

**In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.**

### CONSTITUTIONAL PROVISIONS.

**Sec. 110.** There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

**Sec. 111.** The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

#### STATUTORY PROVISIONS.

***Increased Jurisdiction: Procedure.*** The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

***Appeals.*** Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH DAKOTA**

---

**MIDWAY CO-OPERATIVE ELEVATOR COMPANY, Appellant,**  
**v. GREAT NORTHERN RAILWAY COMPANY, Respondent.**

(169 N. W. 494.)

**Federal Constitution — commerce — regulation — Congress — powers.**

1. The Federal Constitution grants power to Congress to regulate commerce and in executing this power it may enact such laws and provide such regulations as national interest may demand.

**Interstate commerce — regulation of — by Congress — power — supreme — state regulations — in conflict — superseded.**

2. The regulations of interstate commerce provided by Congress are supreme, and any state regulations in conflict therewith or covering the same subject are superseded thereby.

**Congress — authority — extends to every part of interstate commerce — to instrumentality — to agency — authority cannot be thwarted — by commingling interstate and intrastate commerce.**

3. The authority of Congress extends to every part of interstate commerce

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**NOTE.**—Authorities passing on the question of power of state court to pass upon interstate rates are collated in a note in 28 L.R.A.(N.S.) 108, where it is held that a state court has no power to pass upon the reasonableness, fairness, or justice of interstate rates. As to power of state court to review rulings of Interstate Commerce Commission, see note in L.R.A.1917E, 919.

41 N. D.—1.

and to every instrumentality or agency by which it is carried on; and a full control by Congress over the acts committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

**Interstate Commerce Commission**—has complete and exclusive jurisdiction—fixing and regulating rates—may settle discriminatory, preferential, or prejudicial matters—complaints—courts may not hear and pass upon—general rule.

4. The Interstate Commerce Commission has exclusive jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential or prejudicial, and the courts may not, as an original question, hear complaints and pass upon any of the administrative questions which the Interstate Commerce Act has invested the Interstate Commerce Commission with power to determine.

**Common carrier**—equipments to be supplied—services rendered—shipments of grain in bulk—lining of cars for saving—all are matters which concern rate-making—are administrative—should be submitted to commission for inquiry—before resort to courts.

5. The character or equipment which a carrier must provide and allowances which it must make for instrumentalities supplied, and services rendered, by the shipper—such as lining cars used in transporting carload shipments of grain in bulk—are problems which directly concern rate making and are peculiarly administrative on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court.

**Commerce commission**—preliminary action by—must precede submission to courts—cost of lining of cars—for purpose of shipping grain—action by shipper to recover—before submitting question to commission—court has no jurisdiction.

6. "Without preliminary action by the Interstate Commerce Commission a state court has no jurisdiction of an action by a shipper to recover from an interstate carrier sums expended by him (the shipper) in lining and cooping cars furnished by the carrier for interstate carload shipments of grain in bulk, the applicable duly filed interstate rate schedules making no reference to allowances therefor."

Opinion filed May 21, 1918. Rehearing denied November 16, 1918.

From a judgment of the County Court of Cass County, *Hanson, J.*, plaintiff appeals.

Affirmed.

*William Lemke*, for appellant.

The plaintiff lined the cars and placed them in proper condition for the safe transportation of the grain loaded into them, at his own expense. These expenses were necessary and were incurred for the mutual benefit and protection of both parties. Comp. Laws 1913, § 4707.

When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to the common carrier for transportation, or the actual commencement of its transfer to another state. *Re Green*, 52 Fed. 105; 62 Fed. 829; *The Daniel Ball*, 10 Wall. 557; *Coe v. Errol*, 116 U. S. 517.

It was the duty of defendant both under statutory and common law, to furnish suitable cars for use and for the purpose intended. Our statute merely declares the common-law rule. Comp. Laws 1913, § 4707.

It was not necessary that these matters and plaintiff's claim be first submitted to the commerce commission, for the reason that the right to recover existed under the common law, and our statute is but a redeclaration of such law, and is intended to aid in the enforcement of common rights and duties. *Missouri P. R. Co. v. Larrabee Flour Mills Co.* 211 U. S. 612.

Until a railway car has once been appropriated to interstate commerce use, it is subject to state control. *Missouri P. R. Co. v. Larrabee Flour Mills Co.* supra; *Northern Belle*, 9 Wall. 529; *N. O. & T. P. R. Co. v. N. K. Fairbanks & Co.* 90 Fed. 467; *Louisville & N. R. Co. v. Dies*, 18 S. W. 266; *Chicago, A. R. Co. v. Davis*, 159 Ill. 53; 5 Am. & Eng. Enc. Law, 2d ed. 175; *Hoosier Stone Co. v. Louisville C. R. Co.* 131 Ind. 575; *White v. Cincinnati, etc. R. Co.* 89 Ky. 478; *Terre Haute etc. R. Co. v. Crews*, 53 Ill. App. 50; *Beard v. St. Louis, etc. R. Co.* 79 Iowa, 527; *Pratt v. Ogdensburg, etc. R. Co.* 102 Mass. 557; *Alabama, etc. R. Co. v. Searles*, 71 Miss. 774; *Chicago, etc. R. Co. v. Denver*, 45 Neb. 307; 10 C. J. p. 85.

Our statute is not in conflict with the common law, but rather is declaratory thereof; neither does it conflict with the Interstate Commerce Act. *Interstate Commerce Act*, Comp. Stat. § 8563, ¶ 1, 2, § 8595, ¶ 22; *Pennsylvania R. Co. v. Conman Shaft Coal Co.* 242

U. S. 121; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 446, 447; *Pennsylvania R. Co. v. Puritan Coal Co.* 237 U. S. 121, 129; *Pennsylvania R. Co. v. Clark Coal Co.* 238 U. S. 472; *Atlantic Coast Line R. Co. v. Masurky*, 216 U. S. 132.

*Murphy & Toner*, for respondent.

The statement of the case, as denominated by our statute, cannot be allowed and settled except upon notice. A so-called statement otherwise obtained and filed should be stricken from the record. 3 Cyc. 36, 43; Comp. Laws 1913, § 7655.

In the absence of a proper statement, there can be no review by the Supreme Court. *Wisner v. Field*, 11 N. D. 257; *Davis v. Jacobson*, 13 N. D. 430; *State v. Schofield*, 13 N. D. 664; *Schonberg v. Long*, 15 N. D. 506; *Murphy v. Foster*, 15 N. D. 556; *French v. Ry. Co. (S. D.)* 128 N. W. 498.

The time for settling a statement cannot be extended except for good cause shown. *Folsom v. Norton*, 19 N. D. 722.

This court has no jurisdiction to entertain an application for an extension of the time for settling a statement. *Aultman Taylor Co. v. Clausen*, 18 N. D. 483.

In a proper case the record may be remanded for correction. But in this case there is nothing to be corrected, because there is nothing filed which bears semblance to a statement. Remanding from this court is for the purpose of enabling the lower court to make or allow proper corrections, not to make a new record. *Bannier v. French*, 8 N. D. 319, 325; *Moore v. Booker*, 4 N. D. 543, 556; *Coulter v. G. N. R. Co.* 5 N. D. 568-586.

It is discretionary with the trial court in proper cases to grant an extension of time in which to do these necessary things; but the supreme court has no jurisdiction to settle a statement, or to extend time therefor, where no application for such purpose was made to the trial court. *Co. v. Clausen*, 18 N. D. 483; *Folsom v. Norton*, 19 N. D. 722.

Plaintiff in this case repaired the inside of the cars furnished him for the shipment in bulk of grain. He brings this action to recover the cost or reasonable value of such repairs. He did not first submit his claim to the Interstate Commerce Commission, therefore the courts have no jurisdiction and the action should be dismissed. Such

matters are proper for first consideration and adjustment by the Commission. National Council, F. C. A. v. Chicago, B. & Q. R. Co. 34 Inters. Com. Rep. 60; New York State Shippers Asso. v. New York C. & H. R. R. Co. 30 Inters. Com. Rep. 437; Southern Missouri Millers Club v. St. Louis & S. F. R. Co. 26 Inters. Com. Rep. 245, 251; National Wholesale Lumber Dealers Asso. v. Atlantic Coast Line R. Co. 14 Inters. Com. Rep. 154; Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505, 532; Tift v. Southern R. Co. 10 Inters. Com. Rep. 548, 575; Loomis v. Lehigh R. Co. 240 U. S. 43.

All such matters as are here presented are peculiarly within the jurisdiction of the Commission and the courts will decline to act or adjudicate upon them until the Commission has had opportunity to hear and pass upon them. Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556; Texas & P. R. Co. v. Abilene Cotton Co. 204 U. S. 426; Baltimore & O. R. Co. v. Pitcairn Coal Co. 215 U. S. 481; Robinson v. Baltimore & O. R. Co. 222 U. S. 506; Mitchell Coal Co. v. Pennsylvania R. Co. 230 U. S. 247; Morrisdale Coal Co. v. Pennsylvania R. Co. 231 U. S. 304; Minnesota Rate Cases, 230 U. S. 352; Texas & P. R. Co. v. American Tie Co. 234 U. S. 138; Pennsylvania R. Co. v. Puritan Coal Co. 237 U. S. 121; Pennsylvania R. Co. v. Clark Coal Co. 238 U. S. 456.

This case presents problems which directly concern rate making and are entirely administrative in their nature. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199; R. R. v. Puritan Coal Co. supra; Pennsylvania R. Co. v. Clark Coal Co. supra, pp. 469, 470; National Lumber Asso. v. R. R. 14 Inters. Com. Rep. 154; New York Shippers Asso. v. New York C. R. Co. 30 Inters. Com. Rep. 437.

CHRISTIANSON, J. This action was brought to recover moneys expended by the plaintiff in cooping and lining certain freight cars which the defendant furnished to the plaintiff in which to ship grain over defendant's railroad.

In its complaint plaintiff alleges "that at the several times between September 15, 1915, and December 31, 1915, and at several times during the months of January, March, April, and May, 1916, as appears from the annexed schedule, the plaintiff was a shipper of

numerous carloads of grain consisting of wheat, rye, flax, and barley over the railway of said company *from Wolseth, North Dakota, to St. Paul, Minnesota;*" that for each shipment or carload the freight car furnished by the defendant was not properly lined or coopered for receiving or containing the kind of grain sought to be shipped, and that defendant failed and neglected when requested to repair the same and put it in readiness for shipment within four hours after due notice of the defect had been given to the defendant's agent; that the plaintiff was obliged to line and cooper the cars, and pay out and expend on the several cars the sum shown in the schedule annexed to the complaint amounting in the aggregate to the sum of \$151.41.

The defendant in its answer denies the allegations of the complaint and affirmatively alleges that the claims referred to in the complaint arose incident to interstate commerce shipments and in the course of interstate commerce; that the defendant was an interstate carrier, and that at the time of the shipment referred to in the complaint it had filed with the Interstate Commerce Commission the tariffs under which such shipments were made, and that said tariffs did not provide for payment or allowances for repairs of cars or cooperage of the character described in the complaint or otherwise; that said rates had been duly approved by the Interstate Commerce Commission and published and promulgated as required by law, and were then in full force and effect; that the state statute relating to cooperage has no application to interstate shipments and that the court has no jurisdiction over the subject-matter, but that the same is one for the Interstate Commerce Commission.

At the close of the testimony the defendant's counsel made a motion for a directed verdict on substantially the same grounds, set out in the affirmative defense. The motion was granted. Judgment was entered dismissing the action and plaintiff appeals.

Plaintiff predicates its right to recover upon § 4707, Comp. Laws 1913, which provides: "Every railroad corporation or common carrier doing business in this state shall when requested by any shipper of wheat, flax, or other grain, flour or flour mill products, furnish to such shipper a box car or box cars properly lined or coopered for receiving and containing the kind of grain, flour or flour mill products sought to be shipped and if such railroad, railroad corporation

or common carrier shall furnish any car not so lined or coopered to such shipper and shall fail to prepare and put in readiness such car within four hours after notice by such shipper to its agent at point of shipment that such car is not in proper condition such shipper may repair such car at his own expense and recover such sum so expended in a civil action against such railroad corporation or common carrier."

Plaintiff also contends that this section is merely declaratory of the common law, and merely aids a shipper in enforcing a common-law obligation against a carrier.

The Federal Constitution expressly grants power to Congress to regulate commerce among the several states and to make all laws necessary and proper for carrying that power into execution.

"The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The object of vesting such power in Congress was to insure equality and freedom in commercial intercourse, and uniformity of regulation, against conflicting and discriminatory state legislation. 7 Enc. U. S. Sup. Ct. Rep. 303. There can be no divided authority over interstate commerce. The regulations of Congress on that subject are supreme. And when Congress sees proper to act with respect to any particular branch of interstate commerce, state regulations in conflict therewith or acting on the same subject, are thereby superseded. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.* 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; 5 R. C. L. p. 704.

The Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or *locality*, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or *locality*, or any par-



ticular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. *Michie, Carr.* § 4016.

The Interstate Commerce Commission has been vested with plenary administrative power to enforce the provisions of the act. Under the powers conferred the Interstate Commerce Commission may supervise the conduct of carriers, hear complaints concerning the violations of the act, investigate the same, and if the complaints are well founded it may direct not only the making of reparation to the injured person, but may order the carrier to desist from such violation in the future. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, 56 L. ed. 288, 32 Sup Ct. Rep. 114.

The Interstate Commerce Commission has exclusive jurisdiction "to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial." *Michie, Carr.* § 4156. And the courts have no power to originally hear complaints upon any of the matters sought to be regulated by the act and within the jurisdiction of the Interstate Commerce Commission. *Texas & P. R. Co. v. Abilene Cotton Oil. Co. supra.* "The effect of the act is not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation or practice established by an interstate carrier while such rate or regulation remains in force, but to supersede such right entirely, and substitute therefor the remedy provided by the act itself." *Michie, Carr.* § 4156.

"The dominating purpose of the statute," said Mr. Justice Hughes, speaking for the court in the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 419, 57 L. ed. 1511, 1550, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, "was to secure conformity to the prescribed standards through the examination and application of the complex facts of transportation by the body created for that purpose, and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to

undertake to pass upon the administrative questions which the statute has primarily confided to it."

The effect of the act to regulate commerce upon the various problems arising with respect to the interstate traffic has been considered and expounded by the Supreme Court of the United States in many cases. In *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.* 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174, that court held that the Minnesota Reciprocal Demurrage Law was invalid and ineffective as applied to cars used in interstate traffic. In discussing the Interstate Commerce Act and its effect on the Minnesota statute, the court said:—"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme."

In *Illinois C. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. ed. 517, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275, the court held that "Congress has so far undertaken to regulate the subject as to invalidate, as an unlawful regulation of interstate commerce, an order of a state railroad commission under which a carrier may be required, upon demand of a carrier or shipper, and on terms fixed by the commission, to switch empty cars from any connection with a competing interstate railway to a designated side track within its own terminals in a city, for the purpose of being loaded there with goods intended for interstate commerce, and when so loaded, to move the same back to the competitor's line for continued transportation to another state, and also to accept from competing interstate lines at points within the city loaded cars brought from other states, and place them on its own side track although such side track was the real destination contemplated at the time of the original shipment."

In *Texas & P. R. Co. v. American Tie & Lumber Co.* 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885, the court ruled that a suit may not be maintained against a railway company to recover damages resulting from its refusal to accept an interstate shipment of oak railway cross ties in the absence of previous action by the Interstate Commerce Commission, even though the refusal to accept the shipment was based upon the want of any filed or published rate applicable to such shipment.

That questions of the nature presented in and which form the basis of plaintiff's cause of action in this case are among those regulated by the Interstate Commerce Act has repeatedly been recognized by the Interstate Commerce Commission and also by the Supreme Court of the United States. See *National Wholesale Lumber Dealers Asso. v. Atlanta Coast Line R. Co.* 14 Inters. Com. Rep. 154; *New York State Shippers' Protective Asso. v. New York C. & H. R. R. Co.* 30 Inters. Com. Rep. 437; *National Counsel, F. C. A. v. Chicago, B. & Q. R. Co.* 34 Inters. Com. Rep. 60; *Loomis v. Lehigh Valley R. Co.* 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228.

In *National Counsel, F. C. A. v. Chicago, B. & Q. R. Co.* 34 Inters. Com. Rep. 60, the Interstate Commerce Commission considered the complaint of shippers of grain owning elevators at country stations in the states of Illinois, Iowa, Minnesota, Nebraska, Kansas, North and South Dakota, alleging that the railroad companies were not furnishing cars in suitable conditions for the transportation of grain in bulk, and asking that they (the shippers) be allowed either to furnish cars suitable in all respects for carrying this traffic, or make allowances to them for work done and materials furnished to prepare the cars for loading. The Interstate Commerce Commission gave careful consideration to the various aspects of the questions presented and clearly recognized that these questions were within the jurisdiction of and properly determinable by the Interstate Commerce Commission.

In the opinion in that case the Interstate Commerce Commission said:

"Originally cars designed for shipment of grain were equipped with stationary or swinging grain doors, which, however, were not found to be practicable. Because of inability to secure a satisfactory permanent grain door the practice of defendants for more than a

quarter of a century has been to furnish grain shippers at country stations with 'sectional doors,' or boards, which may be nailed to the car door posts. . . . There is no uniformity with respect to the amount or the character of the material furnished by different carriers. Some of them furnish sectional doors, boards, lath and burlap or paper specially designed for the purpose; others furnish sectional doors, lumber and paper; and others furnish nothing but sectional doors and lumber. . . . Practically all cars furnished to these country elevators must be cleaned by the shipper. A large percentage of them require more or less patching, or coopering, to render them fit to carry grain without leakage. It is impossible to determine from the record the exact percentage of cars furnished which the shippers must materially repair before loading. So far as the evidence shows, some patching and repairing work by the shipper, besides placing the grain doors and coopering around them, is required on about 50 per cent of the cars furnished. This work may consist of covering one or more holes or cracks in the floor, or it may, and often does, include repairs to door posts, ends, linings, roof, and sides of car. . . . During the year 1908 and continuing until July, 1911, defendants' rules provided that when cars furnished for grain, grain products, or other bulk freight required repairing to insure against leakage in transit, and the material necessary for the repairing was furnished by the shipper, payment for the actual cost of the same, including cost of necessary labor, but not exceeding 80 cents per car, would be made by the carrier furnishing the car. It developed that it was impossible for the carrier to keep any check of the material used or alleged to have been used, or of the labor so performed. *Known abuses of the rule existed, and discriminations inevitably resulted.*

"For a number of years an allowance of \$2 per car for grain doors furnished was paid to terminal elevator companies. This was found to result in the carriers paying for grain doors that had been made out of material furnished by the carriers. Claims were presented for furnishing grain doors for outbound cars when the doors or the materials used therefor were taken from inbound cars. This allowance and the allowance of 80 cents per car to the country elevators were discontinued at the same time. . . . The repair work done upon cars

by shippers, such as closing a hole with boards or coopering the car with burlap or paper, is not permanent. The work must ordinarily be done at the station from which the shipment is made. In the very nature of things the shipper who loads the car can prepare it for loading to better advantage than can anyone else. It is therefore not unreasonable to expect the shipper to sweep a car or do a reasonable amount of cleaning, or to make some minor and inexpensive repairs to prepare the car for loading and prevent leakage of grain in transit. It is impracticable for the carriers to have competent workmen at all stations to do this work, and minor cleaning, patching and coopering can readily be done by men in the employ of the elevator companies, who know exactly what is to be done and how best to do it. If the car furnished requires much repairing, if its door posts are shattered or broken, or if it has many holes or cracks through which grain would sift in transit, the shipper should refuse to accept it. The obligation of the carrier is to promptly furnish a suitable car. The shipper is not bound to receive and load a car upon which he must expend labor and materials to make it suitable to transport grain. . . . Experience has demonstrated that it is impossible to accurately check claims for material furnished and labor performed by shippers. We conclude that we may not with propriety fix by order a maximum amount that should be paid the shipper by a carrier for labor performed and for materials furnished by him in installing grain doors or doing other incidental repair work on cars furnished for shipments of grain in bulk. *If, however, a carrier makes any allowance to shippers at country stations for work done or materials furnished, the conditions and purposes as well as the maximum allowance must be stated in its tariff and must be applied without discrimination.* The amount and character of the material furnished shippers for grain doors and for incidental coopering and repairing should be uniform and adequate for the purpose; *just what will be furnished should be clearly stated in tariffs.* It is manifest that if a carrier furnishes nothing but loose boards at one point and at another point furnishes sectional doors, lath, paper, or burlap, unlawful discrimination results."

The case of *Loomis v. Lehigh Valley R. Co.* 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228, originated in the courts of the state of

New York. In that case the shipper sought to recover on the theory that the carrier had failed to perform its common-law duty to furnish adequate cars; that the shippers had been compelled to obtain the necessary material and perform the labor required to make the cars adequate for transporting agricultural products in bulk, and that consequently the shippers were entitled to recover as damages their outlay for the material furnished and labor performed. The case involved both intrastate and interstate shipments. The New York court of appeals held that the shippers had a right to recover upon the common-law liability of the carriers, unless the local or Federal statute had established different rules. It concluded that the New York statutes created no bar to recovery and that the shippers were entitled to recover on account of the intrastate shipments. But it further concluded that Congress had assumed such control over interstate shipments as to deprive the state courts of power to consider claims arising out of them. 208 N. Y. 312, 101 N. E. 907. A writ of error was sued out and the cause brought before the United States Supreme Court for review. That court affirmed the decision of the New York court of appeals.

The opinion of the United States Supreme Court is summarized in the syllabus as follows: "The character of equipment which the carrier must provide and allowances which it must make for instrumentalities supplied, and services rendered, by the shipper—such as inside doors and bulkheads in cars and timber therefor—are problems which directly concern rate making and are peculiarly administrative on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court." 240 U. S. 43.

"Without preliminary action by the Interstate Commerce Commission a state court has no jurisdiction of an action by shippers to recover from an interstate carrier sums expended by them in constructing grain doors or bulkheads in cars furnished by the carrier for interstate carload shipments of farm products in bulk, the applicable duly filed interstate rate schedules making no reference to allowances for grain doors or bulkheads." See *Loomis v. Lehigh Valley R. Co.* *supra*.

The opinions of the Interstate Commerce Commission and of the

Supreme Court of the United States in the two cases last cited speak for themselves. The questions involved in the instant case are similar to those which were involved in the cases cited. And in our opinion the doctrine announced by the United States Supreme Court in the case last cited is controlling in the instant case.

Plaintiff contends that the cars on which the repairs were made were not instrumentalities of interstate commerce at the time the duty to repair them arose. It contends that this duty arose when they were ordered; that the cars first became instrumentalities of interstate commerce after they had been loaded with grain, billed for shipment to a point in some other state, and actually started on the way to their destination, and that until they were so loaded, billed, and started, they were subject entirely to state control and state regulations. Plaintiff's contention is distinctly contrary to the principle announced, and fully answered by what the United States Supreme Court said, in the several cases cited above. See *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, and *Loomis v. Lehigh Valley R. Co.* *supra*.

It appears on the face of the complaint, and the evidence shows, that the transactions upon which plaintiff seeks to recover arose during interstate traffic, and are regulated by the Interstate Commerce Act. And under the decisions of the United States Supreme Court the state courts may not entertain plaintiff's action without preliminary action by the Interstate Commerce Commission. The judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). This is an appeal from the judgment of the county court of Cass county that the action be dismissed for the reason that the court has no jurisdiction of the subject of the action. The objection should have been made by a demurrer and then if sustained it would have saved the cost of a needless and useless trial. Counsel for defendant makes objection to the settlement of the statement of the case, but as there has been no judgment upon the merits,

the statement of the case and the evidence become immaterial. If the court had jurisdiction of the subject of the action, the case must be remanded for a trial on the merits.

The action is based on an act for the cooperage of cars by which it is made the duty of the railway company to furnish shippers of grain box cars properly lined and coopered for the grain and in case of failure to do so then, after notice of four hours, the shipper may repair the car and recover the expense in a civil action against the railway company. Comp. Laws 1913, § 4707. This act was passed by reason of the fact that railway companies have been quite in the habit of furnishing cars with small crevices, cracks, and leakages by which grain is lost to the owner, who finds it difficult to prove the loss and to recover compensation by suit for damages. To prevent leakage it may be necessary to line the inside of the car in whole or in part with tar paper and often it is of special importance that the work be done quickly. There is no time to consult Interstate Commerce Commissions.

The complaint shows that in 1915 and 1916 the plaintiff was a shipper of numerous carloads of grain over the road of the defendant from Walseth, North Dakota, to St. Paul, Minnesota; that defendant furnished the plaintiff box cars which were not properly lined and coopered so as to hold the grain; that after due notice was given defendant, it failed and refused to put the cars in a fit condition to receive the grain; that by reason thereof plaintiff was obliged to cooper the cars and to pay for the same several sums, one hundred in all, amounting to \$151.41. Then there is given the date, the number of each car, the labor and material expended in coopering the same.

Clearly the complaint does state a cause of action, in accordance with the letter and spirit of the statute, but counsel for defendant insist that as the grain shipment was interstate commerce, that the necessary cooperage was also interstate commerce and that plaintiff has no remedy except by some suit in the United States Courts or the Interstate Commerce Commission. Still defendant does not point the way to such a remedy or show that the Commission or the United States Courts are in the habit of giving any redress in such petty matters and defendant did not move to have the matters transferred to the United States Courts or to the Commission. There is no showing



that the necessary coöperation of grain cars to such a trivial amount is any part of interstate commerce. Indeed, it is a matter of local urgency which must be met and acted upon in every case before the loading of a car, and before there is commerce of any kind.

The complaint shows it became necessary to coöper about 100 cars and on each car the amount was an average of \$1.50. It was a matter of urgency and the work probably saved the company many times the sum of the expense.

Clearly the coöperation act is constitutional. The complaint does state a good cause of action. Under the statute the county court had jurisdiction of the subject of the action. Hence, the judgment should be reversed and the case remanded for a new trial on the merits.

#### On Petition for Rehearing.

**PER CURIAM.** Plaintiff has filed a petition for a rehearing. The petition presents no question which was not considered in and decided by the former decision.

The petition cites and quotes from decisions holding that the whole subject of liability of carriers to shippers in interstate commerce has not been withdrawn from the jurisdiction of the state courts. We certainly said nothing to the contrary in the former opinion.

The principle announced in the former opinion is that, "without preliminary action by the Interstate Commerce Commission, a state court has no jurisdiction of an action by a shipper to recover from an interstate carrier sums expended by him (the shipper) in lining and coöpering cars furnished by the carrier for interstate carload shipments of grain in bulk, the applicable duly filed interstate rate schedules making no reference to allowances therefor."

That the Interstate Commerce Commission has exclusive jurisdiction of, and that the courts may not as an original question hear, complaints and pass upon any of the administrative questions which the Interstate Commerce Commission has been invested with power to determine, has been conclusively settled by the decisions of the United States Supreme Court. The principle has been reaffirmed subsequent to the promulgation of the former decision in this case. See *Northern P. R. Co. v. Solum*, 247 U. S. 477, 62 L. ed. 1221, 38 Sup. Ct. Rep. 550.

The petition for rehearing invites our special consideration to the decision of the supreme court of Kansas in *Rock Mill. & Elevator Co. v. Atchison, T. & S. F. R. Co.* 98 Kan. 478, 154 Pac. 254, which involved the right of a shipper in interstate commerce to maintain an action in the state courts to recover amounts due for repairing cars so as to put them in condition to hold the shipments. And it is asserted that the conclusion reached by the Kansas court "is exactly the opposite of that reached by this court in this case." An examination of the decision cited discloses that in the Kansas case the tariff of the Railroad Company on file with the Interstate Commerce Commission made provision for the reimbursement of shippers for expenses incurred in repairing cars, and fixed a maximum amount of allowance for each car. Hence, in that case, the condition was present, which is absent, and in our opinion fatal to jurisdiction, in the case at bar. For in the case at bar there was no provision made in the tariff of the Railroad Company for payment of the charges which plaintiff seeks to recover. Obviously, the Kansas decision is not contrary to the views expressed in our former opinion. On the contrary the practices involved in that case assumed, and the decision therein impliedly concedes, that allowances of the charges of a shipper for repairing cars so as to render them fit for proper transportation of shipments are an administrative question, directly concerns rate making, and properly a part of the rate schedules filed by the carrier with the Interstate Commerce Commission.

It is suggested in the petition for rehearing that the rule announced may lead to discriminatory practices by reason of a railroad company's furnishing cars in worse condition to one shipper than to another. This, as to interstate shipments, is a matter for the Interstate Commerce Commission. The contention advanced virtually concedes the administrative character of the practices involved and upon which plaintiff's cause of action is predicated.

We see no reason for receding from the views expressed in our former opinion.

The former decision will stand. A rehearing is denied.

GRACE, J. I concur in denying the petition for rehearing.

41 N. D.—2.

**G. H. MEYER, Respondent, v. J. W. BURCH, H. W. Voight, Lee Mallard, Arthur Knutson, O. G. Davenport, A. A. Stewart, C. McCauley, James Teachout, Frank Teachout, Bert Buckley, W. A. Clark, John Yegen, Oscar Anderson, Carl Anderson, and August Anderson, Members of an Association and Partnership Doing Business as Stewartsdale Rural Telephone Company, Appellants.**

(170 N. W. 126.)

**Association — rural telephone line — constructing and operating — purpose of — members of — negligence of — liability of association for — jury — verdict of — supported by evidence.**

The evidence is examined and *held* to support the verdict of the jury, holding the defendants liable for the negligence of a member of an association organized for the purpose of constructing and operating a rural telephone line.

Opinion filed November 16, 1918.

**Appeal from the District Court of Burleigh County, W. L. Nuessle, J.**

**Affirmed.**

*E. T. Burke*, for Oscar Anderson and Carl Anderson, appellants.

*F. E. McCurdy*, for J. W. Burch et al., appellants.

The plaintiff's theory of this case is that this association is a partnership and that it is liable for the negligent acts of its members. The liability is based upon the doctrine or rule of agency. But the mere fact, "that a servant uses dangerous agency, intrusted to him by his master, in doing an injury to another, does not make the act one of his master's for which he is responsible." In such case it must further appear that the act of negligence of the agent, was done in the course of his employment and for the purpose of forwarding the business of the master. *Galveston, H. & S. A. R. Co. v. Currie*, 96 S. W. 1073, 10 L.R.A.(N.S.) 367; *Wilson v. Peverly*, 2 N. H. 548; *Satterlee v. Groat*, 1 Wend. 272; 27 L.R.A. 166.

The master is not liable where the servant fails to obey his orders and injury follows his acts. 27 L.R.A. 787, note.

*Newton, Dullam, & Young*, for respondent.

A partnership or an association is liable for the torts of its members when committed within the scope of the business for which the association is formed, since each member of an association is the agent of the association in the transaction of its business. 4 Cyc. 312; *Cooley, Torts*, 3d ed. p. 253; *Ingliss v. Millersburg Driving Asso. (Mich.)* 186 N. W. 443.

Such a party cannot avoid liability by letting its work to a contractor who performs it so negligently as to result in injury to another. *Galveston, H. & S. R. Co. v. Currie*, 10 L.R.A.(N.S.) 375.

"A servant, while acting with the instruments which his master places in his hands to be used in his behalf, is acting for and instead of the master, and the master is bound by his acts." *Nashville & C. R. Co. v. Starnes*, 24 Am. Rep. 297.

The question of the partnership of the defendants was properly one for the jury and was appropriately submitted. *Murray v. Walker (Iowa)* 48 N. W. 1075; *Smith v. Hollister*, 32 Vt. 695.

BIRDZELL, J. This is an appeal by a portion of the defendants from a judgment entered in the district court of Burleigh county, in favor of the plaintiff. The action is one to recover damages occasioned to the plaintiff, a brakeman on the Soo Railroad, on the 2d day of January, 1917, by coming in contact with a telephone wire which had been strung across the right of way of the railroad company and causing him to be violently knocked down upon the top of the car upon which he was riding. The jury returned a verdict in favor of the plaintiff against all of the defendants, assessing the plaintiff's damages at \$300. It appears that the wire which occasioned the plaintiff's injury was strung by the defendants Anderson, who did not appeal from the judgment. In 1916 an association was formed in the community in which the defendants reside for the purpose of establishing a rural telephone line to serve the members of the association. The members styled their association the Stewartsdale Rural Telephone Company. It seems that the capital stock of the company consisted of the telephone equipment and the property of the company;

and that the members had a mutual understanding or agreement that they were to share the labor incident to the construction of the line and pro rate the general expenses. There was a written agreement or constitution which provided for a board of directors and for officers of the association. The board of directors was given general executive authority to carry out the objects of the association.

The sole contention of the appellants is that the negligence which caused the plaintiff's injury was the negligence of the Andersons, who do not appeal, for which they alone are liable. It is admitted that the Andersons were members of the association, at least originally, and there is no question but what the defective construction which was the direct cause of the injury was the work of the Andersons in conjunction with one Moran, a hired lineman. It is contended that the work was done by them in violation of the by-laws and the instructions given by the executive officers, and was wholly outside the authority of the Andersons as members of the association. The instructions of the trial court amply cover this phase of the case and the question as to the liability of the defendants resolves itself at once into one of the sufficiency of the evidence to support the verdict against the members of the association other than those who did the work. It is true, as pointed out by the appellants' counsel, that the testimony of Mr. Burch, which covers quite completely the association's connection with the work in question, and the relations existing between the association and the Andersons, goes a long way toward disproving the authority of the Andersons to act for the association. This testimony goes to establish in substance that there was a misunderstanding with reference to the location of that portion of the line which was to be constructed with a view to giving telephone service to the Andersons; that in adjusting this difficulty it became necessary to move some of the poles; that there was delay in stringing the wire and installing the telephones after the wire had been hauled, due to the failure of one Carl Anderson to put up a note as payment of his share; that it was understood between Mr. Burch and Mr. Anderson that Anderson could not "get his phone until he had left a note with Mr. Leonard Bell at the First National Bank in Bismarck;" and that Anderson contended that he would not put up his note until he got the phone. Mr. Burch further testifies that Anderson finally agreed to take the note (which

had been previously executed) to the bank and that he (Burch) had made arrangements with Mr. Shuman, a man qualified to superintend telephone construction work, to send a man to do the work when he would tell him to. The substance of Mr. Burch's testimony is that the company had not authorized the construction work of the Andersons; but, on the contrary, that they had forbidden it for two reasons: First, because they had not put the poles where the line was to be located; and, second, because they had not settled for their proportionate share of the expense. The testimony of Oscar Anderson, however, is that before stringing the wire he had attended a meeting of the association, and that at that meeting he told his associates that there was a piece of ground along the railroad upon which he could not get the right of way for the telephone line and that it would have to be changed; and at that meeting Mr. Burch said, "Run it up along the line and bring it down," and that Anderson asked Burch at that time if he was entitled to his telephone as soon as he got that changed and he said "Yes." He testified further:

"Q. Now, isn't it a fact, Mr. Anderson, that the company wouldn't consent to any of this change of route until after Carl Anderson came in and agreed to pay the extra money? Isn't that a fact? A. He came in when we agreed to change it. *'Sure!' Mr. Burch says, 'when-ever you change that line you are entitled to your telephone.'*" Carl Anderson testified that the poles at the Soo crossing, upon which the line that occasioned the plaintiff's injury was later strung, had been standing since the latter part of October, which would be more than two months previous to the injury. That the other members of the telephone company used the road during this time; that the defendant Voight, secretary of the company, was present when he got the wire to string upon the poles; that he had had the telephone instrument which he intended using since early in the fall; that he had given a note to the bank for the money which he was owing to the company and left the note in the bank. (The date of leaving it there does not seem to be established in the testimony.) He testified further that the members of the company never told him that they were holding up the telephone until the note was paid. As to his fulfillment of the conditions upon which the company was willing to install the telephone, he testified:

Q. Now, isn't it a fact, Mr. Anderson, that the telephone company would not string the wire and would not install your telephone until you made some satisfactory arrangements about the pay? . . .

A. I made satisfactory arrangements with the bank. There is where they told me to do it.

Q. Now, isn't it a fact, Mr. Anderson, that the telephone company would not string the wire and would not install your telephone until you made some satisfactory arrangements about the pay?

A. Yes, they did. . . .

Q. Tell the jury why the telephones were delayed from June until January?

A. I don't know unless it was because they thought that the poles were not in their right places, is the only reason I could see.

As to the authority of the Andersons to proceed with the line work, the record shows clearly that the line work was to be done under the superintendence of one F. L. Shuman; and that Burch, president of the company, had, at one time, left an order with Shuman, covering the construction work in question, but that he had later cancelled it. It is only fair to assume that the Andersons, as members of the association, knew of the general arrangement with Shuman to superintend the work. Shuman testified that one of the Andersons came to him and asked him to supply a man for that purpose and that he refused "in an indirect way to supply the man." The testimony of Oscar Anderson throws some light upon Shuman's answer, wherein he stated that he refused to supply a man "in an indirect way." Oscar Anderson says that Burch had told him to "get a man and do it;" that he had told him to "go to Shuman and get a man." "Shuman," he says, "will furnish you a man" and I went there to get him." However, he got no man from Shuman, the latter saying, "Why don't you do it yourself, it doesn't take much of a man to install a phone and string a wire." It appears that following the conversation with Shuman, the Andersons procured one Moran, who had had experience as a telephone lineman, to assist them in stringing the wire.

It seems to us to be clear upon the whole record that there was a conflict in the testimony with reference to the authority of the Andersons to proceed in the way they did to do the work in question. It

will be noted that in the testimony of the Andersons it appears that whatever they did by way of prosecuting the work was done in the open and generally after consultation with the officers of the company; that they adopted suggestions which were made from time to time by Burch, and that they were guided in the execution of the work by the suggestions of the chosen superintendent, Shuman. In the light of this testimony, we think it clear that the jury was warranted in finding that the Andersons, in negligently stringing the wire, were engaged in carrying on the work of the association, and that they acted as agents of the association in so doing.

In our opinion, this case does not turn upon any technical question of the existence or nonexistence of a legal partnership, nor upon the violation of by-laws made to govern the activity of the various members of the association. The record, as we view it, contains ample testimony to support the verdict of the jury. The judgment entered thereon is right and it is affirmed.

BRUCE, Ch. J. I dissent.

ROBINSON, J. (concurring). This is an action against fourteen defendants. The complaint charges that as a copartnership or voluntary association for the construction and operation of a local telephone, the defendants negligently strung a telephone wire across the track of the Soo Railway Company. That as a brakeman in the employ of said company, the plaintiff, while on the top of a moving freight train, was knocked down, severely bruised, and injured by contact with such wire. The jury found a verdict against all of the defendants for the moderate sum of \$300. Twelve of the defendants appeal from the verdict and judgment and from an order denying a motion for judgment notwithstanding the verdict. There is no claim that the verdict is excessive.

No appeal is taken by the two Andersons, who laid the wire across the railroad track, and the appellants claim that in laying the wire the Andersons acted without any authority and as mere trespassers.

Defendants are farmers living a short distance southeast of Bismarck. During the year 1916 they decided to construct and operate a farmers' telephone line. A written agreement was signed by all the



parties. Each member agreed to do part of the work and to pay part of the expense and to share in the profits and advantages of the telephone line. Each agreed to share in the profits and losses. Without incorporating they signed an agreement in the form of articles of incorporation, declaring that their company should be known as the Stewartsdale Rural Telephone Company, and have a president, vice president, treasurer, secretary, and a board of five directors to be regularly elected by a majority of the stockholders. The written agreement signed by the defendants clearly shows they contemplated and agreed as partners to do a telephone business and to do it in the name and in the manner of a corporation.

A partnership is the association of two or more persons for the purpose of carrying on business together and dividing the profits. Comp. Laws, § 6386.

An agreement to divide the profits of a transaction implies an agreement for a corresponding division of losses. Comp. Laws, § 6392.

Every general partner is the agent for the partnership in the transaction of its business and has authority to do whatever is necessary to carry on such business in the ordinary manner. Comp. Laws, § 6402.

As the construction of a telephone line was one of the primary objects of the partnership, it follows that in such construction each partner was a general agent of all the others and all are liable to third parties for a loss resulting from the negligent and improper construction of its line. Such liability was not in any manner changed or obviated by any agreement between the parties. Hence, there is no reason for considering any evidence of arrangements between the partners in regard to the construction of the line or the special authority of any partner. It in no manner affects the rights of the plaintiff to recover for the injury sustained. So far as his rights are concerned, each member of the company was an officer and a general agent of the partnership.

Every general partner is liable to third persons for all the obligations of the partnership jointly with his copartners. Comp. Laws, § 6410.

Judgment affirmed.

GEORGE GARDNER, Administrator of the Estate of Asa Gardner,  
Deceased, Appellant, v. A. H. LINDEMAN, Respondent.

(169 N. W. 807.)

**Action on promissory note — by holder — claim of purchase before maturity for value — defenses — not so purchased by plaintiff — canceled by payee after maturity — conflicting evidence — verdict of jury on — cannot be disturbed when there is support in the evidence.**

In an action brought upon a promissory note by the holder thereof, who claimed to have purchased the same before maturity for value, one of the defenses to the note was that it was not purchased by the plaintiff before maturity, and that after maturity of the note the defendant was released therefrom by the payee in said note and the note canceled as to the defendant. There being conflicting testimony in this regard, and the jury having found a verdict in favor of the defendant, it is *held*, upon examination of the evidence, that the verdict is supported thereby.

Opinion filed November 18, 1918.

Appeal from the District Court of Steele County, Honorable A. T. Cole, Judge.

Affirmed.

*Charles Simon*, for appellant.

It is essential that there should be some valid consideration for the release of an obligation, such as a promissory note. Such should also be pleaded and proved. 7 Cyc. 737.

Mere voluntary declarations made by a creditor that a debtor is discharged or released do not bind him. 34 Cyc. 1048; *Hayes v. Massachusetts Mut. Ins. Co.* 125 Ill. 626, 1 L.R.A. 303, 18 N. E. 322; *Bender v. Been*, 78 Iowa, 283, 5 L.R.A. 596, 43 N. W. 216.

An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or in writing, with or without a new consideration. *Gilson v. Nesson*, 17 L.R.A.(N.S.) 1208; *Comp. Laws* 1913, § 5833.

The sufficiency of the new agreement and the consideration therefor are questions for the court, and not for the jury, and there is nothing here upon which to base the verdict rendered. *Evans v. Oregon & W. R. Co.* 28 L.R.A.(N.S.) 455.

*C. S. Shippy*, for respondent.

Where two parties own property together, and one sells out to the other, and as a part consideration the buyer assumes and agrees to pay a note of seller, and the holder of the note assents to such agreement, this affords a good consideration for the release of the maker. *Comp. Laws 1913*, § 5833; *Jones v. Austin*, 59 N. E. 1082; *Averill v. Wood*, 44 N. W. 381; *Hall v. Smith*, 14 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561; *Booth v. Dexter Steam Fire Engine Co.* 24 So. 205; *Akers v. Phillips*, 22 Ky. L. Rep. 813, 58 S. W. 790; *Brink v. Stratton*, 188 N. Y. 620, 81 N. E. 1160; *Reeves v. Letts*, 143 Mo. App. 196, 128 S. W. 246.

In the absence of statute, releases are not required to be in writing, and they may be express as well as implied from the acts of the parties and the circumstances of the case. *Jackson v. Lalicker*, 99 N. W. 32; 34 Cyc. 1047; *National Bank v. Guthrie*, 11 S. D. 517, 78 N. W. 995.

GRACE, J. Appeal from the District Court of Steele County, Honorable A. T. Cole, Judge.

This action is brought on a promissory note executed and delivered by A. H. Lindeman and H. C. Frederick to Otto Thress, who, it is alleged, assigned and delivered before maturity for a valuable consideration the note to Asa Gardner. The note is for the sum of \$184.50 and interest from the 11th day of February, 1911, at 12 per cent per annum. Complaint is in the ordinary form. The action is brought only against A. H. Lindeman. The defendant admits the execution and delivery of the note by H. C. Frederick and himself to Otto Thress. He denies that before maturity said note was assigned and delivered to Asa Gardner or anyone else, and alleges that the said Asa Gardner purchased said note, if at all, after the maturity thereof. It appears the note in question was executed by Frederick and the defendant to Thress for the purchase price of certain personal property. Defendant alleges, in substance, that such personal property was purchased from Otto Thress about February 11, 1911; that immediately thereafter Frederick, Otto Thress, and the defendant met in the office of Otto Thress, and entered into an agreement, contract, and understanding whereby in consideration of the sale by the defendant of all his

right, title, and interest of, in, and to the said personal property so purchased by said Frederick and this defendant from Thress, the said Frederick undertook, promised, and agreed to pay and assumed the obligation to pay, at maturity, the said promissory note; that it was then and there distinctly understood and agreed by and between Frederick, Thress, and the defendant that the defendant should and would be entirely released and discharged from all liability upon said note, and the same should and would be the sole and individual obligation and liability of Frederick, to whom, the defendant thereupon sold and delivered his interest in said personal property; that said Thress agreed to and thereupon did cancel and discharge said note and obligation so far as the defendant was concerned. The only facts in dispute are the sale, assignment, and delivery of the note to Asa Gardner by Thress, and the alleged agreement of Thress to cancel and discharge the note and obligation so far as the defendant was concerned. The case was tried to the court and jury. A verdict was returned in favor of the defendant. The plaintiff made a motion for a directed verdict and a motion for a judgment notwithstanding the verdict. Each of said motions was overruled. The appeal is from the judgment and from the order denying a judgment notwithstanding the verdict.

The defendant, in his testimony, describes the property for which the note was given as two buggies, one harness, and one horse. He identified the note in question as the one which he and Frederick executed. He then testified to the selling of his interest in the property to his partner, Frederick. He testified to this transaction as taking place in Thress' office, and stated the time was the 14th day of June, 1911. His testimony shows that when he went to Thress' office he told him about the sale and that he wanted to be released from the note and that Thress said, "That will be all right," and that Thress said he would release him, that the note was there, and that he would cancel his name from the note, and that Lindeman turned over his interest in the property to Frederick. Thress' testimony is to the effect that he sold the note to Asa Gardner about a week after its date and received from him the full face value of the note. He also denies entering into any contract or agreement releasing and discharging the defendant from liability upon the note, or any agreement to cancel and discharge said note and obligation so far as defendant is concerned. There is a

direct conflict in the evidence of Thress and the defendant relative to the sale, assignment, and delivery of the note, and with reference to the alleged agreement between Thress and the defendant with reference to releasing defendant from the note and canceling the note and obligation. Each of these questions and the credibility of the witnesses was for the jury. Its verdict was in favor of the defendant, and there is evidence to sustain the verdict. Appellant relies upon the further point that the alleged agreement was not in writing, and for this reason could not be urged as a legal defense, and further that there was no consideration for the agreement moving to the payee. We are of the opinion that appellant must fail in each of these contentions. The testimony of the defendant shows the alleged agreement, entered into on the 14th day of June, 1911, which was after the maturity of the note, between Thress and the defendant, was then and there fully executed and completed, and nothing remained to be done in the future. According to Lindeman's testimony it was not an agreement to do something in the future, but was one which was then and there fully and completely executed and carried out. This being true, it was not necessary that the agreement be in writing. It also appears from the testimony that at the time of the alleged agreement the defendant turned his interest in the property over to Frederick and thus parted with value, all of which was in the presence of Thress. As we view it, this would be sufficient consideration for the release of the defendant from the note by Thress.

As to the consideration of the release, it may consist of some detriment to the releasee or some benefit to the releasor moving from the releasee or someone in his behalf. The consideration must be, in such cases, either a legal or valuable consideration, as distinguished from a good consideration which is based on relationship or affection, etc. The consideration may move from a third person on behalf of the releasee to the releasor, or from the releasee to a third person at the request or by the acquiescence of the releasor, and, in such cases, it is considered an adequate consideration. 34 Cyc. 1050. It is not necessary to cite further authority in this regard. The jury are the exclusive judges of the facts, and, in this case, must have determined that the note was not sold, assigned, or delivered to Asa Gardner before

maturity, and that the agreement, testified to by defendant, was made, and there is sufficient testimony to sustain its verdict.

There was no error in the instructions of law as given by the court. The judgment is affirmed, with costs.

CHRISTIANSON, J. (concurring specially). The jury by its verdict in this case found that the plaintiff is not a holder in due course of the note involved in this action. The finding of the jury on this question is not assailed on this appeal, and hence is conclusive upon this court. The plaintiff, therefore, stands in the same position as the original payee, Otto Thress. And in my opinion the evidence on the part of the defendant justified the jury in finding that the defendant had been released and discharged from all liability on the note. I therefore concur in an affirmance of the judgment and order appealed from.

ROBINSON, J. (concurring specially). The plaintiff brought this action as the administrator of Asa Gardner, and he avers that in February, 1911, the defendant and H. C. Frederick for value made to Otto Thress a promissory note for \$184.50 and interest, payable June 11, 1911, and that for value and before maturity Otto Thress indorsed the note to Asa Gardner. The answer is that the note was given for personal property purchased by the makers from Otto Thress; that it was not transferred till after maturity; that while Otto Thress held the note, he agreed to release defendant in consideration of his selling and releasing his interest in the property to the other maker of the note.

On the trial Thress testified that he sold the note for its face value a week after it was made. Lindeman testified that on June 14, 1911, at the time of bargaining to sell his interest in the property to his partner, the other maker of the note, he went to the office of Otto Thress to get a release from the note: He says: "We told him about the sale and wanted to be released from the note and he says, 'That is all right.' Q. He had the note there did he? A. Yes, sir." Now a contract is an agreement or a consideration to do or not to do a particular thing, and a contract of release from a note is precisely the same as any other contract. Otto Thress had sold the property to the

makers of the note, and if he agreed to release one maker of the note in consideration of his releasing and transferring his interest in the property to the other maker, that was a sufficient consideration. The case presents only two points of dispute on which there was a direct conflict of testimony, and the jury found for defendant and the court denied a motion for a new trial.

The case was poorly tried. The testimony is far from satisfactory. However, the sum in controversy is small, and it was for the jury to do the guessing. The charge of the court was correct and the law of the case is very simple. If to secure a release from the note the plaintiff transferred his property to his partner, the consideration was just as good as if the transfer had been made to Otto Thress himself. It was an executed oral agreement (Comp. Laws, §§ 5938, 5921). The consideration was sufficient (Comp. Laws, § 5872).

Judgment affirmed.

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JOHN H. HEROLD, Appellant, v. ESTATE OF GEORGE HARRISON HILL et al., Respondents.

(169 N. W. 592.)

**Accounting — action for — trial court — judgment of — for defendant — evidence upon which based — credits for plaintiff — disallowance of — error.**

Upon an action for an accounting, judgment in the trial court was had in favor of the defendant, and upon examination of all the evidence upon which such judgment is based, *held*, that such judgment should be modified, for the reason that the plaintiff is entitled to various credits for which he had not been credited, either by the defendant or by the trial court.

Opinion filed May 21, 1918. Rehearing denied November 18, 1918.

Appeal from a judgment of the District Court of Cass County, North Dakota, Honorable *Chas. A. Pollock*, Judge.

Modified.

*Barnett & Richardson*, for appellant.

The fact that plaintiff in giving his testimony and relating therein the facts as he understood and claimed them to exist, referred to trans-

actions with the deceased, does not render such testimony wholly incompetent and inadmissible. It is not the law that plaintiff, in such cases, is an incompetent witness on every subject and in reference to everything, otherwise relevant, excepting specific transactions had with the deceased. *Bank v. Hilliboe* (N. D.) 114 N. W. 1085.

Evidence of the plaintiff as to any and all transactions had with deceased's agents who are still living is competent and admissible. 7 L.R.A.(N.S.) 684, note, and cases cited.

*W. J. Courtney and Pollock & Pollock*, for respondent.

The burden of proof is upon the plaintiff. He has not sustained the allegations of his complaint by any competent evidence. The only really competent evidence in the case refutes the allegations of the complaint. Plaintiff's testimony as to transactions had with the deceased is wholly incompetent. Code, § 7871, ¶ 2; *Regan v. Jones*, 14 N. D. 591; *Larson v. Newman*, 19 N. D. 153.

GRACE, J. Appeal from the judgment of the district court of Cass county, Charles A. Pollock, Judge.

This is an action for an accounting, brought by the plaintiff against the defendant John A. Hill, as administrator of the estate of George Harrison Hill, deceased.

It appears from the pleadings that plaintiff held a certain crop contract for the purchase of land from one Peter McLachlin, then owner of said land, which land was described as the east one half of section 27, township 143, range 53, Cass county, North Dakota. It also appears that during the year 1906, plaintiff and said George Harrison Hill entered into an agreement wherein Hill agreed to take over said premises from McLachlin, and to take over and pay the McLachlin contract, and issue to the plaintiff a new contract for deed covering the premises. It also appears that at the time of taking over such contract to such land by Hill to McLachlin, and the issuance of the new contract by Hill to plaintiff, the plaintiff was indebted to Hill on account of other indebtedness, exclusive of the contract, in the sum of \$2,720.24; \$647.76 of this other indebtedness was added to the contract price of such land as between Hill and the plaintiff, and of course reduced the other indebtedness to that extent. The complaint alleges that such other indebtedness was from time to time reduced by pay-



ments until December 18th, 1910, when a new note was given for the unpaid balance in the sum of \$1,520.40, which note the plaintiff alleges has been paid. Plaintiff further alleges that, during the years 1910, 1911, and 1912, he farmed certain school lands for said Hill, being part of section 36, township 143, range 53. Plaintiff claims, in his complaint, that it was agreed between Hill and the plaintiff that the plaintiff should receive credit upon the contract and note, of indebtedness existing and owing from plaintiff to Hill, for the reasonable value of plaintiff's services in farming and caring for said land and the crops thereof, and that by reason thereof, the plaintiff is entitled to credits to the extent of \$2,200. Plaintiff also makes claim for certain threshing performed for Hill and one Linderman during the years 1911 and 1912, on a portion of the school land which Linderman had rented from Hill. In addition to this, plaintiff also produced at the trial a large number of checks which were made payable to Hill and which were cashed and the money received by Hill. There were also some receipts, executed by Hill to the plaintiff, for other money, and there are other various claims by the plaintiff against Hill, all of which are referred to in the complaint, the pleadings, or the testimony, and to which we need not more specifically refer, but which aggregate \$9,000.

The answer admits the making of the contract from Hill to the plaintiff, and sets forth that the consideration of such contract was \$6,720, made up of the amount owing McLachlin plus \$647.76 of the other indebtedness owing from plaintiff to Hill. In addition to this, the answer claims, by reason of the other indebtedness, that plaintiff was owing Hill the further sum of \$2,203.84. Defendant, by way of further defense, alleges that Hill loaned money to the plaintiff, advanced money for him and on his account, furnished him merchandise, and that from time to time settlements were had and made between said plaintiff and Hill, in which settlements plaintiff was charged with such loans and advances of money and merchandise, and credited with all payments made by him to said Hill, and the defendant claims a balance due upon such contract and all other alleged indebtedness from plaintiff to Hill in a very large amount, and the trial court awarded the defendant judgment in the sum of about \$9,683.97.

It will be seen, therefore, that the parties are a great distance apart as to the actual condition of the account between them. It is perfectly

plain that there is gross error somewhere. It is perfectly plain, also, that the estate of George Harrison Hill must account to the plaintiff for all money which it is shown Hill received, and must show the application of such money either upon the land contract or upon other indebtedness due from plaintiff to Hill. The estate of George Harrison Hill must also show where any other credits which the plaintiff was entitled to were credited, that is, upon what indebtedness were such credits, if any, applied. We will refer to these matters further when we discuss some of the credits other than payments of money to which plaintiff claims to be entitled. The defendant must account for all the payments of whatever kind or character made by the plaintiff to George Harrison Hill, and all the credits to which plaintiff may show himself entitled, and if the defendant fails to account for any such payments whether by check, money, or other credits, it would seem that the plaintiff, as a matter of law, would be entitled to recover judgment for all such credits and payments for which he has not been credited, and failure of the defendant to account to the plaintiff for all such credits, moneys, and checks paid to George Harrison Hill, cannot be excused on the ground that the accounts were not kept in as good order from the standpoint of bookkeeping as they might have been, nor by the further fact that the transactions between the parties were many. It seems that a fairly good record of a great deal of the business between the parties was kept.

The first matter which is contended by the plaintiff to be an error is the amount of the McLachlin contract at the time it was taken over by Hill. At that time, the contract that had existed between McLachlin and Herold was figured up and when \$647.76 of plaintiff's other indebtedness was added to the balance estimated to be due upon the contract between McLachlin and Herold, the amount was \$6,720, which was the amount inserted in the new contract between Herold and Hill as the balance due upon the contract for the land in question. The plaintiff insists that the total of the balance of such contract between McLachlin and Herold, as figured by Wilson, is too great by \$200. The difference between plaintiff's figures and those upon which the defendant acted probably arises from the employment of a different method in computing interest. It may be possible that the method adopted by the defendant was not the most accurate method, but it

must also be conceded he must have settled and paid McLachlin upon the basis of the amount found to be due McLachlin by the method of calculation used by defendant. If this assumption be true, Hill gained nothing even if the most proper method of computing interest were not used. Herold and Hill entered into the written contract wherein Herold agreed to pay the balance due upon the new contract which had been ascertained, to which had been added a certain portion of plaintiff's indebtedness to which we have above referred. There appearing to be no fraud in the matter of ascertaining the balance due upon the McLachlin contract, nor any undue advantage appearing intentionally to have been taken and Herold, having made no complaint at the time the amount thereof was ascertained, nor at any time so far as we have been able to determine until the bringing of this action, and a long period of time having elapsed since the making of the new contract, Herold must be held to be bound by the amount inserted in the new contract.

We are of the opinion that the amount stated in the new contract, less the \$647.76 of other indebtedness which was added to the balance due on the McLachlin contract, must be taken to be the actual balance due upon the McLachlin contract at the time of the execution of the new contract, and that that balance, together with \$647.76, must be conceded to be the actual consideration for the new contract at the time of its execution. The plaintiff's claim, that the balance due upon the McLachlin contract is \$200 in excess of the true amount due thereon at the time the same was taken over by Hill, cannot be allowed.

At the trial, the plaintiff offered in evidence ten checks aggregating \$2,598.74, which were issued by the plaintiff to G. H. Hill and they were indorsed by Hill and paid by the bank from which they were drawn, and Hill got the money for them. These checks were Exhibits 12, 13, 14, 15, 16, 23, 21, 18, 25, and 26. Plaintiff claims he received no credit for any of these checks upon Exhibit 11, the note representing the balance due under the new contract or otherwise. On examination, such note disclosed no credit for any of such checks with one exception, Exhibit 26, a check dated March 5, 1910, for \$134, is credited on Exhibit 11. This, deducted from \$2,598.74, the sum of such checks, leaves \$2,464.74, which was not indorsed upon Exhibit

11, nor does it appear that the plaintiff received credit upon any other obligation which he owed the defendant. Clearly, the plaintiff is entitled to credit for the \$2,464.74. These checks seem to have been disregarded by the trial court. This may have been on the theory that the indorsement of the words, "Payment on land" by the plaintiff on the checks in question after their payment vitiated them as a credit upon any indebtedness owing by the plaintiff to the defendant. We think it must be conceded that the additional words, "Payment on land," were placed upon the checks after they had been paid and after their return to the possession of the plaintiff; but if the plaintiff, by the addition of such words after the return of the checks to him, had no evil motive in adding such words to the checks, and did not thereby gain any advantage for himself, and there was no evil intent, and the motive was identification, it is difficult to see how such action could vitiate the checks, even if the defendant had not consented to the placing of such additional words upon the checks after their return to plaintiff's possession.

It must be conceded that the plaintiff had, in the first instance, legal right to direct upon what debt, note, or obligation, the amount of such checks should be applied. We do not believe that making such indorsements on checks after their return, as in this case, is to be encouraged, but we cannot readily understand how the checks would be vitiated to the extent that plaintiff would be entitled to no credit for the amount of money, conclusively proved to have been received by Hill by reason of having received and cashed such checks.

Plaintiff claims that the indorsement on the check "Payment on land" was placed upon the checks at the suggestion and consent of G. H. Hill. The witness Gould substantiates, in his testimony, this claim. If this testimony is true, and it is a fact that Hill authorized the plaintiff to indorse the checks with the additional words, showing that the payments were upon the land, there was certainly no reason why such indorsement could not lawfully be placed upon such checks. It is evident that, in this case, the only effect of such indorsement would be to indicate the obligation to reduce which the amount of such checks should be applied.

If the defendant could show that the amount of such checks was in fact applied upon any other obligation owing from the plaintiff to de-

fendant, in that event, in view of all the circumstances, and even though the possible indorsement might be considered a direction to apply the sum of such checks to the discharge of a certain debt, equity might not interfere to compel application of the sum of such checks upon the note representing the amount of the land contract, although it is a general rule that the debtor has a right to direct the application of the payments to a particular debt, where he owes the same party two or more obligations.

The next material point that we consider is the crops and their disposition for the years 1911 and 1912 from the east one half of section 27, township 143, range 53, being the land which is the subject of sale from Hill to Herold and the quarter of school land which was tilled by plaintiff. One of the disputed questions is the manner in which the plaintiff leased the school land. Herold claims that the school land was leased from the state by Hill, who paid the state, and that the plaintiff paid the rent for the school land to Hill. Plaintiff claims that he furnished the seed and was to get the entire crop. Herold claims this same method of renting existed in the years 1911 and 1912 as to the school land. It was shown by Mr. Eddy, deputy county treasurer of Cass county, that Hill leased the N. W.  $\frac{1}{4}$  of section 36, township 143, range 53, from the state for the years 1908 to 1913 inclusive. This was the same quarter of school land farmed by the plaintiff.

We are of the opinion that, at least during 1905 and 1906, plaintiff paid the defendant for the use of the school land as testified to by the plaintiff. Exhibit 4 shows the charge against the plaintiff by the defendant for \$162.85 upon the land contract for 1905 and \$155.25 for 1906. The plaintiff testifies that these amounts were what he paid for the use of the school land for those years. The plaintiff seeks to show that he had a similar arrangement with the defendant for the school land during the years 1911 and 1912. The claim on behalf of the defendant is, he leased the school land to the plaintiff, furnished the seed, and was to pay half the threshing bill and was entitled to half the crop.

Linderman's testimony is to the effect that in 1909 he had a talk with Herold as to the terms he had the land upon, and that the plaintiff said he had it rented the same way that Linderman had. Linderman testified that he told him how he had his land rented, which was on

shares, Hill to furnish the seed and pay his share of the thresh bill, and the testimony further showing, in effect, that Linderman was to get paid for hauling Hill's share to the elevator. This was claimed by Linderman to be the terms of the leasing of the school land in 1909 when Linderman claimed that he and Herold leased the school land for five years.

Linderman being a disinterested witness, it would appear that this testimony should receive considerable credit, and we believe that it outweighs the testimony of the plaintiff with reference to the terms upon which the school land was rented. We hold, therefore, that the plaintiff leased the school land from the defendant upon these terms; that is, upon the terms above stated by Linderman. It is conceded that the grain raised upon the school land which plaintiff farmed for the year 1911 was of the value of \$762.05. On plaintiff's Exhibit 6, being the note secured by the chattel mortgage, there was indorsed \$381.05. This undoubtedly is the value of the plaintiff's half the crop from the school land for 1911, and disposes of the contention of the crops upon the school land for that year. As to the crop on the W.  $\frac{1}{2}$  of section 27, for 1911, the plaintiff shows there was wheat of the value of \$1,055, barley \$580, and flax of the value of at least \$50, and by adding to this half the value of the crops on the school land, \$381, and \$315, for the hay thereon, there is a total of \$2,381 which the plaintiff should have been credited, but was in 1911, in fact, only credited with a total of \$1,367.43, leaving a difference of \$1,013.57 with which the plaintiff was entitled to be credited in the fall of 1911, and he is entitled to that additional credit with interest thereon at the legal rate since that time.

The plaintiff showed, by his testimony, that he got none of the grain and witness Gould testified that Hill admitted, in his presence, he had sold all of the 1911 crop on the half section. There was no testimony disputing the value of the hay, and the value thereof as testified to must be taken as the true value.

As to the 1912 crop on the school land, the plaintiff testifies there were 500 bushels of wheat at 80 cents a bushel, 500 bushels of oats at 25 cents a bushel, and 60 tons of hay at \$4.50 a ton. In an account book which the defendant kept, Exhibit 116, there was entered there-

in as the amount of crop produced for the year 1912 upon the school land the following:

283 bushels of oats, value .....	\$ 62.40
2 loads of wheat, value .....	137.60
4 loads of wheat, value .....	266.20

and that a credit of one half of this amount is allowed plaintiff, or \$233.10. To this a further credit is added for threshing for Hill and Linderman in the amount of \$516.56, making a total of \$749.66. We take as the true amount of grain produced on the school land for 1912, the statement thereof as contained in Exhibit 116. Against the \$749.66 is charged, in the same Exhibit 116, on the opposite page, and entered as paid by Hill for Herold the following amounts:

Bert Pamer .....	\$ 25.00
St. Anthony note and three months' interest .....	267.75
August 24, 1912, cash .....	50.00
September, check .....	100.00
July 14, 1913, Hillsboro Bank .....	17.50
Hay land .....	40.00
Linderman work .....	155.00
<b>Total</b> .....	<b>\$655.25</b>

We find no testimony disputing any of these payments for Herold by Hill as set forth on page B of Exhibit 116. The total of these payments and credits set forth on page B is \$655.25, instead of \$755.25, as shown by the total of the payments and credits on said page B. In other words, Hill made a mistake of \$100 in finding the sum of said payments and credits. Herold is therefore entitled to a further credit of \$94.41, the difference between his half of the crop on the school land for 1912 which is \$233.10, plus the \$516.56 threshing account allowed, a total of \$749.66, and the amount of the payments and credits allowed him by Hill on page B, \$655.25, which leaves a balance of \$94.41, for which Herold is entitled to credit, with interest since 1912 at the legal rate.

This disposes of the crop on the school land for the year 1912 and \$516.56 of the threshing bill. Plaintiff claims, on the half section in 1912, there were 1,500 bushels of wheat at 85 cents a bushel. He also admits that he sold about half of this wheat, and the balance or remaining half was sold by Mr. Hill. Plaintiff claims that he got no part of the half sold by Mr. Hill, evidently meaning that he got no credit for half the crop sold by Mr. Hill. In Exhibit 116, page C, it appears that Hill gave Herold credit for wheat of the value of \$350.75 for the year 1912. From this credit the defendant deducted taxes in the amount of \$165.38, leaving a net credit of \$185.37 to Herold. This amount is indorsed on the land contract December 23, 1912.

We take this statement of Hill's as to the value of one half of the crop received from the home half section in 1912, as the correct amount of the value of half of the crop received from the home place in 1912, for which plaintiff received full credit. The plaintiff testified that there were 60 tons of hay on the school land for 1912, valued at \$4.50 a ton. This makes \$270. There is no testimony disputing the amount or value of this hay, and the plaintiff, therefore, must be credited with \$270, with interest thereon since 1912 at the legal rate. This disposes of all the crops for the years 1911 and 1912. As to the threshing bill claimed by the plaintiff against the defendant for the years 1911 and 1912, it appears from the plaintiff's own testimony that such threshing bill was threshing for the years 1911 and 1912 upon land in the vicinity of the school land which the plaintiff was farming. It is difficult to tell just where or upon what land such threshing was done. Whether it was all done for Linderman on his school quarter, or whether it was partly on section 2, and for whom, the testimony does not disclose. Plaintiff has already received credit for \$516.56. Under the record as it now stands, we do not believe he is entitled to any further credit for threshing, and we so hold.

Referring to Exhibit 6, the promissory note for \$1,520.40 dated December 18, 1910, with interest at 10 per cent per annum, executed by the plaintiff to the defendant, the trial court found there was on the 1st day of March, 1916, \$1,209.68 remaining unpaid upon said note. We are of the opinion that such finding of the trial court is



sustained by the testimony. We are of the opinion, also, the Kernahan Dickson note, principal and interest to September 1, 1914, amounting to \$478.60, was properly chargeable to the plaintiff; also the \$103.94 to the Stewart Mercantile Company and \$11.80 credit for cattle were properly chargeable against the plaintiff as advances made to him by the defendant. Plaintiff also seeks to show that there is a mistake in the indebtedness claimed by Hill against Herold at the time the open indebtedness from Herold to Hill was placed in Exhibit 5, the promissory note for \$2,203.84. In order to substantiate plaintiff's claim he offers Exhibit 4A in evidence upon which there is a memorandum to the following effect: "Mortgage—\$845.10." Plaintiff claims that at the time of the settlement on December 15, 1906, there was returned to him a note for \$900. Plaintiff claims that the \$845.10 mortgage item was represented by a \$900 note marked Exhibit 10. Plaintiff's brief refers to the note as Exhibit 30, but Exhibit 30 is only for \$89.74. Plaintiff claims that the indorsements on Exhibit 10 reduce it so that there would be approximately \$500 due thereon December 1, 1906, instead of \$897.-04, and desires the difference with interest to be deducted from the balance due upon the \$1,520 note, claiming the error was a continuous one in all the transactions with reference to the notes representing the open indebtedness at the various times from the execution of the original note for the open indebtedness and in renewals thereof.

It must be conceded that the plaintiff and defendant made a settlement on December 15, 1906, and it must be assumed there was an accounting had between them at that time, and a statement of the balance due agreed upon, for which the plaintiff gave his note for \$2,203.84, upon which payments were subsequently made, and balance of which note was placed in the renewal note of \$1,520. With this view of the matter, we hold that the plaintiff is concluded by the settlement of the open indebtedness entered into by the plaintiff and defendant on December 15, 1906, and that such settlement cannot be questioned, and especially not at this late date. The law looks with favor upon settlements, and where they are honestly and fairly entered into, as this settlement seems to have been, such settlement should be considered as disposing of all disputed matters

which were in contemplation of the parties at the time of the settlement and which received their consideration.

We hold that the plaintiff is bound by his settlement of December 15, 1906, as to the amount of his open indebtedness, then owing to the defendant, and that the alleged error of \$397.04, with interest thereon, cannot be allowed to plaintiff.

Insofar as the matters, as determined upon this appeal, affect the judgment entered in the lower court, such judgment shall be modified in accordance with this decision, and made to conform to the conclusions reached herein.

The costs allowed the administrator in the lower courts shall remain the same, appellant to have the costs on this appeal.

CHRISTIANSON, J. (dissenting). To administer justice in this case is, indeed, a perplexing problem. The lips of one of the parties to the transactions involved are sealed by death. The other party was sworn, and testified as a witness in his own behalf. He has a great deal to gain by a favorable determination. He admitted that he had made certain statements variant from his testimony. He had made certain notations upon checks after they had been cashed. These notations may have been made innocently, but the notations were favorable to the plaintiff, and it seems that his actions were susceptible of being construed as not altogether innocent.

There is much force in the deductions reached by Mr. Justice Grace on most of the propositions involved. But inasmuch as the trial court, who heard and saw the plaintiff testify, apparently arrived at the conclusion that he was unworthy of belief, I am not prepared to say that the trial court's findings should be overturned. The trial judge saw and heard the plaintiff and the other witnesses. We have merely the cold record before us.

**ELLEN DINNIE, Respondent, v. UNITED COMMERCIAL TRAVELERS, a Corporation, Appellant.**

(169 N. W. 811.)

**Accident insurance policy — fraternal benefit association — constitution & by-laws — action to recover under — complaint — demurrer.**

1. In an action brought to recover upon an accident policy of insurance in a fraternal benefit association, where the constitution and by-laws of the insurance association are made a part of the contract of insurance, and the part of the constitution reads thus: "Class A, insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the result of bodily injury, hereinafter mentioned, effected through external, violent, or accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes,"—*held* that the complaint failing to state that the death of the insured was the result of bodily injury through external, violent, and accidental means, was demurrable, and did not state a cause of action.

**Contract of insurance — substance of — claim under — disallowance — action on — limitations — policy — statute.**

2. The contract of insurance contained a provision in substance that no action could be maintained upon the policy after the expiration of six months from the time of notice of disallowance of claim. This action was not brought within said six months' period, but was brought within a year after notice of disallowance of claim. *Held* that the cause of action is not barred by the Statute of Limitations.

Opinion filed November 18, 1918.

Appeal from the District Court of Grand Forks County, Honorable Charles M. Cooley, Judge.

Reversed.

*O'Connor & Johnson*, for appellant.

In an action to recover upon a policy for accident insurance, the complaint must show by proper allegations the occupation in which the insured was engaged at the time of the accident, or death, and it should negative extra or increased hazard, when a smaller sum is

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NOTE.—As to when stipulation limiting time for suit on accident insurance policy begins to run, see notes in 47 L.R.A. 696; 48 L.R.A.(N.S.) 906; and L.R.A. 1918F, 510.

recoverable as a result. *American Acci. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473.

In this case the policy provides that no action can be maintained after the expiration of six months after notice of disallowance of claim. This action was not brought until long after six months succeeding such notice.

This limitation begins to run on the date of the receipt of notice by the insured. *Switchmen's Union v. Colehouse*, 227 Ill. 561, 81 N. E. 696; *Cook v. N. P. R. Co.* 32 N. D. 340, 155 N. W. 867; *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167; *Fullman v. New York Union*, 7 Gray, 61, 66 Am. Dec. 462, 7 Ann. Cas. 918.

The argument of public policy is to be received and considered with much caution.

It is the function of courts to interpret the law, and the interpreters of the law "have not the right to judge of its policy." *Roberts v. Cannon*, 4 Dev. & B. L. 267; Civ. Code, chap. 19, § 4978.

"The language of subsequent statutes cannot be controlled by any supposed policy of previous ones." *Sutton v. Hayes*, 17 Ark. 462; *Goodrich v. Russell*, 42 N. Y. 184; *State v. Cram*, 16 Wis. 347, 298 Fed. 447; *Central R. Co. v. Hamilton*, 71 Ga. 465; *Billingslea v. Baldwin*, 23 Md. 85; *Sutherland*, Stat. Constr. § 274.

If the so-called policy of the law is resorted to, and an attempt made to ascertain and follow it, the result would come within the condemnation that such would tend to a stricter interpretation of plain, unambiguous terms, words, and phrases, than otherwise. 2 *Sutherland*, Stat. Const. § 369, p. 711; *First Nat. Bank v. Ludvickson*, 8 Wyo. 236, 80 Am. St. Rep. 928, 56 Pac. 994.

The term "Insurance Law" includes decisions as well as statutes. Fraternal benefit societies are therefore exempt. *Miller v. Dunn*, 72 Cal. 462, 1 Am. St. Rep. 69, 14 Pac. 29; *Jams v. Broadway Roller Rink*, 136 Wis. 595, 118 N. W. 170; *Johnson v. Humboldt*, 91 Ill. 92; *Johnson v. Fidelity Co.* 239 Ill. 509; *Vincent v. Mutual Ins. Co.* 74 Conn. 684, 51 Atl. 1066.

In an action upon a policy of accident insurance, the complaint must contain allegations to show that death was the result of external, violent, and accidental means, and these allegations and facts should be proved upon the trial. *Switchman's Union v. Colehouse*, 227 Ill.

56, 81 N. E. 696; *Kicsee v. Mutual*, 134 Iowa, 54, 197 N. W. 1027; *Summons v. M. W. A. (Mo.)* 172 S. W. 492; *Newman v. R. R. Asso.* 42 N. E. 650; *Hester v. Fidelity & C. Co.* 69 Mo. App. 197.

*Murphy & Toner*, for respondent.

Conditions as to increase of the hazard, under all classes of insurance, have been held to be conditions subsequent, and it is not only unnecessary for plaintiff to plead a compliance therewith, but it is necessary, in order that defendant may take advantage of their breach, that they be specially pleaded in the answer. 1 Cyc. 286; 2 Clement, Fire Ins. p. 310; *Fishler v. California Ins. Co.* 66 Cal. 178; *German Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286; *Pierce v. Ins. Co.* 123 Mass. 572; *New York v. Ins. Co.* 3 Abb. App. Dec. 251; *Newmann v. Ins. Co.* 17 Minn. 123; *Lounsbury v. Protection Ins. Co.* 8 Conn. 459; *Standard L. etc. Ins. Co. v. Keen*, 11 Tex. Civ. App. 273; *Phoenix Ins. Co. v. Stork*, 120 Ind. 444; *Phoenix Ins. Co. v. Rickel*, 119 Ind. 155; *Rediker v. Queen Ins. Co. (Mich.)* 65 N. W. 105; *Roussel v. Ins. Co.* 41 N. Y. Super. Ct. 279.

Where a subject is treated in a general manner, it will not be supposed that it was the intention to abrogate particular legislation as to the details, which had been given attention, applicable only to a part of the same subject. *Ex parte Crow Dog*, 109 U. S. 556; *State v. McCurdy*, 62 Minn. 509, 64 N. W. 1133; *State v. Judge*, 38 Mo. 529; *Brown v. Commissioners*, 21 Pa. 37; *State v. Treasurer*, 41 Mo. 16; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Thompson v. State*, 60 Ark. 59, 28 S. W. 794; *Mills v. Sanderson*, 68 Ark. 130, 56 S. W. 779; *Home for Inebriates v. Reis*, 95 Cal. 580, 44 Pac. 238; *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599; *Kelly v. School Directors*, 66 Ill. App. 134; *Rankin v. Cowden*, 66 Ill. App. 137; *Arnold v. Council Bluffs*, 85 Iowa, 441, 52 N. W. 347; *Boyd v. Randolph*, 91 Ky. 472, 16 S. W. 133; *Music v. R. Co.* 114 Mo. 309, 21 S. W. 491; *State v. District Ct.* 14 Mont. 452, 37 Pac. 9; *Mantle v. Largey*, 15 Mont. 116, 41 Pac. 1077; *Rymer v. County*, 12 L.R.A. 192, 142 Pa. 108; *Hayes v. Arrington*, 108 Tenn. 494, 68 S. W. 577; *People v. Commissioners*, 7 Utah, 279, 26 Pac. 577; *State v. Corson*, 6 Wash. 250, 33 Pac. 428; *State v. Purdy*, 11 Wash. 343, 44 Pac. 857; *Colvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *State v. Hobe*, 106 Wis. 411, 82 N. W. 336.

There is nothing mysterious about the rules of law applicable to pleading in this class of cases.

The general rules of pleading applicable in suits on life insurance policies are also applicable to suits on accident and benefit policies. 25 Cyc. 916; 29 Cyc. 222-225; 1 Cyc. 285.

GRACE, J. Appeal from the district court of Grand Forks county from an order overruling a demurrer to the complaint, Honorable C. M. Cooley, Judge.

The action is one to recover \$6,300 with interest from the 9th day of November, 1916, alleged to be due upon a certain accident insurance policy issued by the defendant to plaintiff. The complaint, in substance, alleges the defendant is an Ohio corporation authorized to do business in the state of North Dakota; that it is a fraternal benefit association engaged in the business of insuring its members against injury and death, and has authority so to do. The complaint contains allegations as to the time when the plaintiff was received into the association as a member through the Minot council No. 277 of Minot, North Dakota; the issuance to the plaintiff of the policy describing it; the compliance of the plaintiff, during his lifetime, with the articles of association of the defendant and compliance with the regulations and by-laws in force at the time of the issuance of the certificate, and those thereafter adopted, and that the plaintiff performed all the agreements and conditions of the certificate. The complaint further shows that the plaintiff died on or about the 9th day of November, 1916, but not from any other causes excepted in said certificate or the constitution or by-laws of said defendant, and further shows notice of death of the plaintiff was furnished to the defendant within a time described and also delivered to the defendant due proof of the death of the plaintiff. Complaint further shows the defendant has money in the treasury sufficient to pay the plaintiff's claim. It alleges the proper demand for the payment of the amount of the policy and the refusal of the payment thereof by the executive committee of the defendant, and shows that the beneficiary named in the policy is the mother of the plaintiff.

The defendant demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The

plaintiff came within what was denominated Class A by the provisions of the constitution of the defendant at the date of the certificate, part of which reads thus: "Class A insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the result of bodily injury hereinafter mentioned, effected through external, violent, and accidental means, herein termed the accident which shall be occasioned by the said accident alone and independent of all other causes."

The complaint contains no allegations that the death of the insured was the result of an accident or that it was caused through external, violent, and accidental means. An allegation of this character and to this effect in the complaint is indispensable in order that the complaint may show the liability of the defendant under the terms of the policy and in accordance with the application, by-laws, and constitution which is a part of the contract. The plaintiff claims this point was up before the trial court or mentioned in his presence prior to the time of decision on the demurrer and should not be here on appeal. The complaint alleges "that said John Dinnie died on or about the 9th day of November, 1916, that not from any other causes excepted in said certificate or the constitution or by-laws of said defendant." The plaintiff, in effect, admits that if the above allegation is not sufficient to meet the objection by the defendant that the complaint contains no allegation of death by external, violent, and accidental means, then it is clearly demurrable.

It is clear to us the above allegation is not sufficient and it, in no manner, shows the death to have been the result of accident or through external, violent, and accidental means. In this respect, it is clear the demurrer should have been sustained.

The only remaining question to be considered is that relating to the time of the bringing of the action. The defendant claims the plaintiff has no right to maintain the action, not having commenced the same before the Statute of Limitation had expired, as fixed by the contract of insurance, which was within six months from the time of the notice of the disallowance of the claim. As near as we are able to determine from the limited record before us and so far as insurance is concerned, the defendant is engaged only in furnishing that kind of insurance which is denominated accident insurance. The lodge sys-

tem under which the defendant operates is largely for the purpose of facilitating the carrying out of the main object of the institution, which is the effecting of accident insurance to the members of the United Commercial Travelers when they become members of the corporation in the manner provided by the constitution and by-laws.

Section 4978, Compiled Laws 1913, provides that insurance corporations, associations, and societies engaged in the business of accident insurance, may limit the time within which suit may be brought on any claim based upon the policies or certificates of membership, and that after the expiration of the time limited they would not be liable thereon. It is further provided that such limitation shall not be less than one year from the time such right of action accrues. The general statute on the limitation of actions with reference to contracts provides that an action may be maintained thereon at any time within six years after the right of action accrues.

Section 5927, Compiled Laws 1913, in effect, provides that every stipulation or condition in a contract restricting a party from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void. It appears that the provision in the defendant's contract limiting the time within which action may be brought to six months from the time of notice of rejection of a claim is invalid as being contrary to the provision of all the above sections with reference to the limitations of action, and, in stating this, we are not passing upon the validity of § 4978, Compiled Laws 1913, nor do we hold it to be invalid because it is in conflict with subdivision 1 of § 7375, Compiled Laws 1913, which is to the effect that an action upon contract must be commenced within six years after the cause of action has accrued. As we view it, the question is not presented in this case. That being true, it would serve no useful purpose to determine the question until it is squarely presented. The plaintiff has brought the action in time under any of these statutes, and having brought the same within one year from the time the right of action, if any, accrued, he is within time. If the plaintiff had not brought the action until after the expiration of one year from the time the right of action accrued, the question would then be presented whether §§ 4978 or 7375 controlled.



The defendant also claims that it is a fraternal benefit society. Assuming this to be true and that the constitution and by-laws and the application become part of the contract, as is usually provided by such associations, and assuming that defendant claims the right to make the six months' limitation of the time to bring an action against it by virtue of the law with reference to fraternal benefit societies and by reason of the provisions of its constitution and by-laws, it is clear to us there is no such right under chapter 191 of the Session Laws of 1913, which deals at length with fraternal benefit societies, or any other law of this state. The act of fixing the time in which actions must be brought is a legislative prerogative which requires a legislative act. The general law is, that an action may be brought upon contract, either express or implied, within six years from the time action accrues. If a fraternal benefit society provided by its by-laws or constitution that an action upon contract may be brought within three years, two years, one year, or thirty days, as the case may be, from the time the right of action has accrued, such society has, in effect, enacted a law relative to the limitations of actions as to its contracts. It is clear to us that such associations would have no such power or authority unless specifically granted to them by the legislature, and if such a grant were given, its validity would at least be very doubtful. While such associations, under the law, have the general power of managing their internal affairs and transacting their business, and, to do that, may adopt a constitution and enact by-laws providing for the manner in which the business of the association is to be done, and in general the nature, form, and extent of the contract with its members, such constitution and by-laws cannot be in conflict with the laws of the state; nor is the power granted such associations to enact by-laws to vary the terms of the law relative to limitation of actions on contract, or, in effect, repeal it and enact substantially a different law upon the subject. The legislature has the power to fix the limit of time within which an action on contract may be commenced after the right of action has accrued, subject to the requirement only that the time must be reasonable. Under the general law with reference to the limitations of actions on contract where the action must be commenced within six years after the right of action has accrued, there can be no question but the time is reason-

able. The same may be said with reference to the time specified in particular law referring to a particular contract where such time, though less than six years, is a substantial period of time such as is provided by the law of this state for life insurance contracts. We need not say whether the one-year period specified in § 4978 with reference to the time of bringing an action against an accident insurance company after the right of action has accrued is reasonable or not. That question is not presented, the suit in question having been brought within the year. We are clear that the action of the plaintiff, if she have one, is not barred by the Statute of Limitations. We are not fully convinced that it is necessary to allege and prove the occupation of the plaintiff at the time of his death. If the occupation at the time of death is different from that at the time of the issuance of the policy, or if it is claimed that such change avoids the insurance or that the occupation at the time of death is more hazardous than the original occupation, such matters may be in the nature of defensive matter. However this may be, we are clear the plaintiff's complaint would not be demurrable by failure to allege the occupation at the time of death.

The order of the District Court is reversed and the case is remanded to it, and the plaintiff is allowed twenty days after the remittitur is returned to the District Court in which to serve and file an amended complaint. Appellant is allowed statutory costs on this appeal.

BIRDZELL, J. I concur in the result.

CHRISTIANSON, J. (concurring specially). This is an appeal from an order overruling a general demurrer to the complaint. The defendant asserts that the complaint is fatally defective and that the demurrer should have been sustained for three reasons:

1. That the complaint does not allege that the death of the insured was occasioned by external, violent, and accidental means; and that the certificate attached to the complaint shows upon its face that there is no liability unless death resulted from external, violent, and accidental means.

2. That the complaint shows upon its face that suit was commenced more than six months after the claim had been rejected by the

supreme executive committee, and after notice of the rejection had been sent to and received by the beneficiary, the respondent in this case; and that the beneficiary certificate sued upon provides that no suit shall be maintainable upon such certificate, unless the same is commenced within six months from the date of the rejection of the claim by the supreme executive committee.

3. That the complaint does not sufficiently aver, or at all, that the insured was not engaged in a more hazardous occupation at the time of his death than when he was insured, although the policy provides that change of occupation must be brought home to the insurer by sufficient notice.

I will consider these propositions in the order stated.

(1) In my opinion the first objection specified is well taken, and renders the complaint demurrable. The certificate sued upon provides for indemnity only against injuries or death "effected through external, violent, and accidental means." This being so, the complaint should show that the death of the insured was so occasioned. 1 C. J. 489. The complaint in this case does not show this. Plaintiff's counsel virtually concede that the complaint is demurrable for this reason. In their brief, they say: "This point was never before the trial court, or mentioned in his presence before this matter was decided, and should not be here on appeal. The complaint was drawn on the theory that this was an ordinary death benefit policy, and was drawn in proper form on such theory. The matter was presented to the trial court by both sides and considered by the trial court on the theory that the complaint was all right unless the time for bringing the suit had passed." Counsel further state that this "is not advanced as an argument in this brief," but presented solely as a matter of justice to the trial court.

We, of course, have no means of knowing exactly what took place in the court below. We have before us only the complaint, the demurrer, and the order overruling the demurrer. We must determine the case upon this record. The question presented is: Does the complaint state facts sufficient to constitute a cause of action? In my opinion it does not, owing to the fact that it does not show that the death of the insured was occasioned by external, violent, and accidental means.

(2) It will be noted that the second objection, if sustained, is fatal to plaintiff's cause of action. No question has been raised as to whether this question can be raised by demurrer; but both parties have assumed that it may properly be raised in this manner and have requested that a decision be made upon this point, even though the complaint be held demurrable for one or both of the other reasons assigned.

The complaint alleges, and it is assumed by the defendant, that the defendant, "is a fraternal benefit association." And it seems that it comes within the provisions of § 5088, Compiled Laws 1913, relating to such associations.

Under the laws of this state every stipulation or condition in a contract which limits the time within which a party may enforce his rights under such contract is void. Comp. Laws 1913, § 5927. This general provision was adopted during territorial days, and has been a part of our statutory law during our entire existence as a state.

No life insurance policy may be issued or delivered in this state which contains "a provision limiting the time within which any action at law or in equity may be commenced to less than five years after the cause of action shall accrue." Comp. Laws 1913, § 6635.

But every corporation, association, or society transacting the business of accident or sickness, or accident and sickness, insurance in North Dakota, may limit the time within which suit may be brought against it on any claim based upon its policies or certificates of membership; but such limitation cannot be for a less period than one year from the time the right of action accrued. Comp. Laws 1913, § 4978,

In 1913 the legislature enacted chapter 191, Laws of 1913, which provides "for the regulation and control of fraternal benefit societies." In this act it provided that except as therein provided, such societies shall be governed by that act "and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter shall apply to them unless they be expressly designated therein." Comp. Laws 1913, § 5061A.

Based upon these statutory provisions, the appellant presents the following premises: (1) That the legislature, by authorizing life and accident insurance companies to place certain limitations upon

the time within which suits may be brought on policies issued by them, has in effect declared as a part of the public policy of the state that the rules relating to limitations of actions upon contracts in general are inapplicable to life and accident policies; and, (2), that chapter 191, Laws 1913, places fraternal benefit societies in a class by themselves; and that this act contains no provision restricting a fraternal benefit society from placing a limit on the time within which suit must be commenced on a beneficiary certificate issued by it.

From these premises, it is argued that there is no statutory restriction whatever upon the right of a fraternal benefit society to limit the time within which an action may be brought upon a beneficiary certificate issued by it. The argument is unsound. It will be noted that it is first contended that life and accident policies issued by insurance companies are so essentially different from other contracts that the laws relating to limitations of actions on other contracts are inapplicable to such policy contracts. And it is next contended that there is such an essential difference between insurance companies transacting such insurance business, and fraternal benefit societies transacting the same kind of business, that such societies stand in a class by themselves, and, hence, are properly exempted from all the rigid requirements of our laws applicable to insurance companies.

"The basic principle most generally relied upon by the authorities is that statutes of limitations are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses." 25 Cyc. 983, 984. This principle also inheres in limitations stipulated by the parties to a contract themselves, in cases where they are permitted to so stipulate. If there is such essential difference between companies writing life and accident insurance, and fraternal benefit societies writing similar insurance, as to require the societies to be exempted from the rigid laws applicable to the companies, then clearly the legislature might deem it proper to provide different periods of limitations as to suits brought upon the different contracts of insurance. An ordinary life or accident policy is a business contract. But fraternal

benefit societies are not supposed to be organized solely for the purpose of writing insurance. Such societies must have a lodge system. Its members are initiated, and are supposed to be bound together by fraternal ties. It seems that the legislature might very properly have concluded that the ordinary statutes of limitations ought to apply in actions on certificates of insurance issued by such societies.

While the legislature has seen fit to exempt fraternal benefit societies from the general insurance laws, it has not seen fit to declare that such societies shall be exempt from the statutory provisions relating to contracts in general. Section 5927, *supra*, applies to all contracts, except of course those specifically exempted from its operation by other laws. Barring such exception, it applies to contracts of insurance. See *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799. Comp. Laws 1913, § 4978, *supra*, applies to accident and sickness insurance contracts. At the time of its enactment it was clearly intended to apply to and cover contracts of insurance written by fraternal benefit societies.

The avowed object of chapter 191, Laws 1913, as stated in the title of the act, is to provide "for the Regulation and Control of Fraternal Benefit Societies." The act does not specifically declare either § 4978, or § 5927, to be repealed, or inapplicable to accident insurance certificates issued by fraternal benefit societies. Neither does it make any reference to the limitations of actions on, or the right of benefit societies to impose limitations as to such actions in, the certificates of insurance. It is elementary that repeals by implication are not favored. And while it is true that where the legislature enacts a law manifestly intended to embrace the entire law on some subject, such enactment will impliedly repeal all prior statutes on that subject, still "a special act will not repeal a general law unless there is a manifest repugnancy between their provisions or one was obviously intended as *pro tanto* a substitute for the other." 36 Cyc. 1093. And "one statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose." And "when there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed." Sutherland, Stat. Constr. § 138.

And I am satisfied that the legislature has manifested no intent in

chapter 191, Laws 1913, to repeal the existing provisions of law, relating to limitations of actions, properly applicable to certificates of insurance issued by fraternal benefit societies. And inasmuch as the policy provision relied upon by the defendant in this case is invalid under either § 4978, or § 5927, it is unnecessary to determine which section applies. For in any event a fraternal benefit society may not limit the time within which suit may be brought on a certificate of insurance issued by it for a less period than one year from the time the right of action accrues.

(3) The remaining objection (that the complaint is defective because it fails to show the occupation of the insured at the time of his death) is one upon which we need express no opinion. This matter is discussed and the authorities collated in *Corpus Juris*. See 1 C. J. p. 491, § 249. And the effect of attaching an instrument as an exhibit to a pleading is discussed in *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588. See also 31 Cyc. 560 et seq.

BRUCE, Ch. J., concurs in the opinion of Mr. Justice CHRISTIANSON.

ROBINSON, J. (concurring specially). This is an appeal from an order overruling a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action on the ground that the action is barred by a contractual limitation of six months. The complaint avers that the defendant is a fraternal benefit association of Ohio; that on December 8, 1915, John Dinnie became a member of the association, and at the time of his death, he was a member in good standing; that he died in November, 1916, but not from any cause excepted in the certificate of membership or the constitution or by-laws of the defendant, which certificate is made a part of the complaint. It is further averred that proof of death was duly made and on December 30, 1916, defendant refused to pay the death loss.

The plaintiff is the mother of the deceased and the beneficiary named in the certificate. By its terms the insurance company contract provides for an indemnity only against bodily injury or death "effected through external, violent, or accidental means" occasioned by accident alone and independent of all other causes, and that no

benefit shall be payable unless there is some external and visible marks of the accident upon the body, nor unless the external and violent accident is the proximate and sole cause of death or disability. Then it is provided that no suit to recover loss shall be commenced after the lapse of six months from the time the claim is disallowed.

It is obvious the complaint fails to state facts showing that the death was caused by violent and accidental means. For aught that appears from the complaint, death may have been the result of ordinary and natural causes. In regard to the six months' limitation, it is clearly no part of the insurance contract. It is in no way contemplated by the insurance application. It is merely a one-sided, unilateral declaration which the company chooses to insert in its policy. It is in direct conflict with the policy of the law and the statute forbidding a contract limiting the time within which a party may enforce a legal right. Comp. Laws, § 5927.

It is true that by § 4978 a limitation of one year may be imposed by certain mutual benefit societies organized and doing business in this state, but the defendant is not such a society, and one year does not mean six months. The case is entirely clear and it presents no question for any discussion.

Reversed.

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STATE OF NORTH DAKOTA, Respondent, v. JOHN HIERTZ,  
Appellant.

(170 N. W. 118.)

**Bastardy proceedings — complaint — warrant of arrest — are civil proceedings.**

1. The legal proceedings in cases of bastardy, though commenced in somewhat similar manner to those of a criminal case, that is, by the making of a complaint and the issuing of a warrant of arrest based upon the complaint, are, nevertheless, under our statute, civil in their nature.

**Bastardy — charge of — trial — verdict of jury — evidence sustaining.**

2. Defendant was put upon his trial before a court and jury on the charge of bastardy, and the jury returned a verdict against him. *Held*, that the verdict is amply sustained by the evidence.



**New trial — motion for — newly discovered evidence — as ground for.**

3. Defendant in due time made a motion for a new trial on the ground of newly discovered evidence. The motion was overruled, and in this there was no error.

Opinion filed November 20, 1918.

Appeal from the District Court of Richland County, Honorable *Frank P. Allen*, Judge.

Affirmed.

*W. S. Lauder*, for appellant.

The defendant's motion for a new trial, based on the ground of newly discovered evidence, was addressed to the sound discretion of the trial court. Where the appellate court is convinced that this discretion was not wisely exercised, or has been abused, it will not hesitate to overrule the trial court. Under the uniform construction given to the statutes authorizing courts to grant or refuse new trials, signification of the words, "at its discretion," has been materially limited.

The discretion allowed to be exercised by the court means and is a sound legal discretion, to be exercised in conformity to law. Such statutes are remedial in their character and are intended to furnish a simple, speedy, and efficient means of relief in a most worthy class of cases. *Freeman*, Judgm. 3d ed. § 106; *Bailey v. Taaffe*, 29 Cal. 422; *Johnson v. Eldred*, 13 Wis. 482; *Kitzman v. Minnesota, Thr. Mfg. Co.* 10 N. D. 26; *Coleman Mfg. Co. v. Feckler*, 16 N. D. 227; *Stitson v. Rankin*, 40 Wis. 527; *Barto v. Sioux City Electric Co.* 119 Iowa, 179; *Grady v. Donahoo*, 108 Cal. 211; *Barrie v. Northern Assur. Co. (Minn.)* 109 N. W. 248; *Walsh v. Boyle*, 94 Minn. 437.

A new trial shall be granted when verdict is "clearly against the evidence." *Barto v. Sioux City Electric Co.* supra; *Comp. Laws* 1913, subd. 6, § 10,917.

The defendant was entitled to a new trial on the showing made, whether or not this be regarded as a civil or criminal action. *Comp. Laws* 1913, subds. 4, 7, §§ 7659, 10,917.

Evidence is not cumulative unless it be of the same kind and to the same point. *Glidden v. Dunlap*, 28 Me. 379; *Bradish v. State*, 35 Vt. 452; *Parker v. Hardy*, 25 Pick. 246; *Lefever v. Johnson*, 79

Ind. 554; *Halstead v. Horton*, 38 W. Va. 727; *Hinton v. Cream City R. Co.* 65 Wis. 323; *O'Shields v. State*, 55 Ga. 696; *People v. Superior Ct.* 10 Wend. 285; *Wolf v. Mahan*, 57 Tex. 171; *Golds-worthy v. Linden*, 75 Wis. 24; *Parshall v. Klinck*, 43 Barb. 203; *Wilson v. Plank*, 41 Wis. 94; *Boggess v. Reed*, 83 Iowa, 548; *Layman v. Minneapolis, etc. R. Co.* 66 Minn. 452.

And even where it is directed to an issue that was involved and tried in the first trial, it does not follow that the new evidence is necessarily cumulative. *Waller v. Graves*, 20 Conn. 306.

The modern rule is that a new trial should be granted if the newly discovered evidence is of such a character as that it will probably produce a different result, whether cumulative or otherwise. 1 *Spelling, New Trial & Appellate Pr.* § 225.

In fact all corroborative evidence is cumulative. The question is as to its probative character and force. *Wilcox Silver Plate Co. v. Barclay*, 48 Hun, 54; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Keet v. Mason*, 167 Mass. 154; *Preston v. Otey*, 88 Va. 491; *Barker v. French*, 18 Vt. 460.

*J. G. Forbes*, State's Attorney, *C. E. Lounsbury*, Assistant State's Attorney (*W. E. Purcell* of counsel), for respondent.

Where a witness in such a case as this clearly demonstrates his desire to aid the defendant by testifying to personal acts of sexual intercourse with the complaining witness, and the jury finds against the defendant, it becomes evident that they did not credit such testimony, and that like testimony of other witnesses would also be discredited. 21 N. W. 401.

Proceedings in bastardy being civil in their nature, the rules of evidence that govern in civil cases apply, and the paternity of the child may be established by a preponderance of the evidence alone, and need not be proved to a moral certainty. 7 C. J. 995, and cases cited.

"Proof of connection with another man does not necessitate a finding for the defendant, and is merely a circumstance to be considered in determining the child's parentage." 7 C. J. 994.

"The diagnosis of pregnancy is most difficult in the beginning, nearly all the certain signs being limited to the second half of the pregnancy. If a woman who has always had her courses regularly

and who has been exposed to become impregnated and the menstrual flow does not appear at the time it is expected, there is prima facie great probability that she is pregnant." Garrigues, *Obstetrics*, p. 102.

The application for a new trial on the ground of newly discovered evidence is regarded with suspicion and examined with caution; the applicant is required to rebut the presumption that the verdict is correct and that he has not used due diligence in preparing for trial. 14 Enc. Pl. & Pr. 790, 791.

Ordinarily a new trial will be refused where the new evidence is merely cumulative of evidence actually introduced by the movant on the trial, or is merely impeaching in its character. 14 Enc. Pl. & Pr. 791 and cases cited; 29 Cyc. 880, 881.

It must also appear that the new evidence sought to be produced is competent, credible, and material, and that due diligence was exercised to produce it at the former trial. The facts claimed to constitute diligence must be fully set forth, for the court determines this question. 7 C. J. 1000; *Gardner v. State*, 94 Ind. 489; 29 Cyc. 892.

Association of the complaining witness with other men, not within the period of gestation, is immaterial, except as bearing upon the nature of their relationship. 7 C. J. 990, 991 and cases cited; *Goodwine v. State*, 31 N. E. 554; *State v. O'Rourke*, 124 N. W. 138.

To warrant the granting of a new trial on such ground, the new evidence must be of such a decisive or conclusive character as to render a different result certain—according to some authorities. 29 Cyc. 898-903; 14 Enc. Pl. & Pr. 806.

Such motions are addressed to the sound judicial discretion of the trial court, and its decision will not be reversed unless a clear abuse is shown. *Gates v. C. M. & St. P. R. Co.* 154 N. W. 441; 29 Cyc. 887.

GRACE, J. Appeal from the district court of Richland county, *Frank P. Allen*, Judge.

This is an appeal from the district court of Richland county overruling a motion of the defendant for a new trial. The defendant was brought before W. P. Robbins, justice of the peace, upon a warrant issued by him, upon a complaint signed and sworn to by Clara Hoffman. In the complaint she alleged that she was an unmarried woman

and was on the 27th day of March, 1916, delivered of a bastard child, begotten by the defendant, John Hiertz, on or about the 27th day of June, 1915, in the township of Barney, in the county of Richland and state of North Dakota. A hearing was had before the justice of the peace, the defendant being present. At such hearing Clara Hoffman was examined as a witness, and the court, after hearing the testimony, required the defendant to give bond in accordance with the provisions of § 10,486 of the Compiled Laws of 1913; the purpose of such bond being to require the appearance of defendant at the next term of the district court of Richland county to answer the complaint, and to abide the judgment and orders of the court therein. The case was tried in the district court of Richland county to the court and a jury; a verdict was rendered and judgment was duly entered thereon on the 29th day of February, 1917. The judgment was that John Hiertz should forthwith pay to Clara Hoffman, for and toward the maintenance and education of the child, \$200 in cash, and \$12 on the first day of each and every month thereafter until the further order of the court, and that he secure the payments of said sums by an undertaking with sufficient sureties, to be approved by the clerk of the court; and that in case defendant neglected or refused to comply with any part of the judgment, he should be committed to the county jail in and for Richland county until discharged therefrom according to law. The defendant made a motion for a new trial, which was denied.

The material facts are as follows: The complaining witness, Clara Hoffman, was a single woman, twenty-one years of age, a resident of Richland county, North Dakota; she was employed on defendant's farm as a servant part of the year 1913, and from June, 1914, to April, 1915, and from June until October, 1915. The defendant is a single man, a farmer, who cultivates three quarter sections of land. The complaining witness claimed that an act of intercourse was had by the defendant with her on June 27th, 1915, and a child was born in Richland county, North Dakota, on March 27th, 1916. Complaining witness also testifies that the defendant had sexual intercourse with her three or four times a week continuously during most of the time she was employed by him. She testifies she never had sexual intercourse with any other man, and that the defendant is the father

of the child. She admits no act of sexual intercourse with the defendant after June 27th, 1915. The defendant denies that he ever at any time had sexual intercourse with the complaining witness. The defendant placed other witnesses on the stand to prove the immoral character of the complaining witness. Peter Schonnes, one of his witnesses, testified that he had sexual intercourse with the complaining witness at various times, among other times, being one in April, 1915, and one when she came to his room on defendant's premises about the 21st or 22d of June, 1915. There were other witnesses who gave testimony tending to impeach the moral character of the complaining witness. The jury, after listening to all the testimony, including that of the complaining witness, returned a verdict as above set forth.

The proceedings in this case, though commenced in a somewhat similar manner to those of a criminal case, by the making of a complaint and the issuing of a warrant of arrest based upon a complaint, are, nevertheless, under our statute, civil in their nature. The state is interested to the extent that it does not desire the child to become a public charge, and it is protected in this regard where a sufficient sum is judged to be paid by the father of the illegitimate child for its support, maintenance, and education. By such a judgment the mother of the child is also assisted in rearing the child and in its support and maintenance. The sole question involved in this case is whether or not the defendant is the father of the child in question. The jury are the exclusive judges of the credibility of the witnesses. It may give credit to the testimony of one witness and discredit the testimony of others. In this case it evidently discredited the testimony of the defendant and his witnesses and believed the testimony of the complaining witness and that of other witnesses produced by plaintiff and rendered a verdict in plaintiff's favor. We do not think such verdict or the judgment entered thereon is against the weight of the testimony. There is nothing in the record to indicate the jury was in any way prejudiced or that its verdict was rendered through bias or sympathy.

The motion for a new trial is based upon alleged newly discovered evidence. In support of the motion are the affidavits of John Hiertz, Charles Elliot, Edward H. Boehme, and Albert Warner. The affida-

vit of the defendant is to the effect that since the case was tried he discovered certain other persons knew certain facts material to his case; that he did not know that such persons possessed such information at or prior to the trial. These persons were three persons by the names of Boehme, Warner, and Elliot. The affidavit of the defendant is to the effect that no laches occurred on his part in producing said persons at the trial as witnesses, and in showing the materiality of the testimony of Boehme, Warner, and Elliot, all of whom, it is alleged, would be present to testify if a new trial were granted. As we view the affidavits, they are entirely insufficient, and the testimony which witnesses would give if they were present at a new trial would, we believe, be immaterial. The only facts that could be shown by Elliot were that some time about the 21st of September, while at the house of defendant, and having gone to the room of Peter Schonnes therein to call him, and in doing so and upon walking directly into the room, he found Schonnes and Clara Hoffman in what may be termed a compromising position; that upon entering the room he found Peter Schonnes undressed and in bed and Clara Hoffman sitting on the side of the bed in such position that her lower extremities as high as her knees were to be easily seen. Boehme, another of the persons who, it is said, will give material testimony, shows by his affidavit that he was in the employ of the defendant from April to the 1st of June, 1915; that on several occasions Clara Hoffman did solicit and invite him to have sexual intercourse with her; that he did have sexual intercourse with her on several different occasions, and that at all times Clara Hoffman readily consented to such acts. It will be noticed that all these alleged acts of sexual intercourse, if any, between Boehme and Clara Hoffman, occurred between April and the first of June, 1915. This would be entirely outside of the period of gestation, which was from the 27th day of June, 1915, until the 27th day of March, 1916. Such testimony therefore would be immaterial. The question in this case, as before stated, is not whether Clara Hoffman had sexual intercourse with different persons, but who is the father of the child. Equally immaterial are the statements in this affidavit that Clara Hoffman had told Boehme that she had intercourse with many different men at different times. If such acts could be particularized and also fixed within the period of gestation,

that might be material testimony, but as alleged to have occurred they are not. To the same effect is the affidavit of Warner, who testifies that he had sexual intercourse at various times, during the months of January and February, 1915, with Clara Hoffman. All such testimony is immaterial, as the acts of sexual intercourse disclosed were not within the period of gestation, and consequently could not have resulted in the conception of the child in question. Warner further says in his affidavit that he told Clara Hoffman that he did not wish to be the cause of her becoming pregnant with child and be compelled to carry the attending burdens thereto; that Clara Hoffman then told and informed Warner that he need have no fear of any trouble because of said acts of sexual intercourse; that in case she became pregnant, she would claim defendant to be the father of the child so conceived, and that she would not blame or implicate in any manner or way said Warner. Warner further states in his affidavit that he had sexual intercourse with several females during the last several years and knows by the manner in which they act and behave whether or not they have had sexual intercourse prior to the time when he had sexual intercourse with them; that he knows that said Clara Hoffman did not, prior to the time when she and the affiant had sexual intercourse with one another in the month of January, 1915, in the barn on the farm operated by John Hiertz, have sexual intercourse with any other man. We see no materiality in any of such proposed testimony. It in no manner, as we view it, tends to prove that John Hiertz was not the father of the child in question. Very little, if any, of the testimony could be admitted if a new trial were granted. The material testimony in a case of this character on the part of the defendant and in his behalf is that which shows, or tends to show, that he was not the father of the child. That is the sole question in this case. The purported testimony to be given by the witnesses Boehme, Elliot, and Warner, as disclosed by their affidavits, is not of such materiality as to warrant granting a new trial. The order of the trial court overruling defendant's motion for a new trial is affirmed, with costs.

CHRISTIANSON, J. (concurring specially). The sole question involved upon the trial of this action was whether the defendant was

the father of a child born to the complaining witness, Clara Hoffman, on or about March 27th, 1916. There was a square conflict of testimony upon this question. The jury found the defendant to be the father. The defendant moved for a new trial on the grounds: (1) That the verdict is against the overwhelming weight of the evidence, and was the result of prejudice against the defendant and sympathy for the complaining witness; and (2) newly discovered evidence. The trial court denied a new trial, and defendant appeals. The only error assigned on this appeal is that the court erred in denying a new trial.

I have read the evidence and the affidavits submitted upon the motion for a new trial. The defendant was ably defended. He seems to have had a fair trial in every respect. I do not believe that an appellate court is justified in saying that the trial court erred in refusing a new trial.

BIRDZELL, J. (concurring specially). I concur in the result and in the reasons assigned therefor in the opinion prepared by Judge Grace, except that I am not prepared to say that all the newly discovered evidence would necessarily have been inadmissible upon a second trial. I am convinced, however, that the newly discovered evidence is not of such a character as would be likely to change the result, and I consider that the showing of diligence is weak.

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**WILLIAM MAAS**, Respondent, v. **WILLIAM H. RETTKE** and  
Johanna Rettke, Appellants.

(170 N. W. 309.)

**Mortgage—by husband and wife—to secure payment of husband's individual note long past due—no extension of time—no new consideration—no new note—wife merely a surety.**

1. Where the owner of land executes a mortgage thereon to secure a note

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**NOTE.**—Authorities discussing the question of necessity of new consideration to bind third person who signs as surety, indorser, or guarantor after execution and delivery of original contract by principal are collated in notes in 44 L.R.A.(N.S.) 481, and L.R.A.1918E, 579.



long past due at the time of the execution of the mortgage, and there is no new or independent consideration for the mortgage and no extension of time of payment of the note, and the payee has surrendered no existing legal rights, and there is no new note, payable on demand or at a future time, taken at the time of the execution and delivery of the mortgage, *held* that the wife of the mortgagor, who signed the mortgage with her husband, was merely a surety.

**Original consideration of old note — wife receiving no part — execution of mortgage by wife — without consideration.**

2. And, further, *held* that there was no consideration, so far as she was concerned, for the execution and delivery of the mortgage, it also appearing that she received no part of the consideration of the past due note which the mortgage was given to secure.

Opinion filed November 29, 1918.

Appeal from the District Court of Mercer County, North Dakota, Honorable *J. M. Hanley*, Judge.

Reversed and remanded.

*H. L. Berry*, for appellants.

"Where an aged German woman, unacquainted with business forms, had agreed to convey land subject to a lease and is subsequently induced by false representations of the grantee to execute a warranty deed making no mention of such lease, she is entitled to have the deed reformed in equity so as to conform to the agreement of the parties." *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866; *Koch v. Poitras*, 36 N. D. 144.

It is fraud to knowingly disclose to the other party only a part of the real and material facts. *Smith, Frauds*, p. 8; *Page v. Parker*, 43 N. H. 363; *Camp v. Camp*, 2 Ala. 636.

The execution by appellant of the mortgage with her husband on their homestead to secure the payment of the husband's long past due promissory notes, the appellant not having received any of the benefits resulting from the original notes, and no new note being given at the time, and no new consideration passing to appellant, and no extension of time on the old notes, was without consideration to appellant.

A consideration is a benefit flowing from the promisee to the promisor, or a prejudice suffered by the promisee on behalf of the prom-

isor. Comp. Laws 1913, § 5872; *Kansas Mfg. Co. v. Grandy*, 11 Neb. 448, 38 Am. Rep. 370; *Barnes v. Van Keuren*, 31 Neb. 585, 16 N. W. 834; *Linton v. Cooper*, 53 Neb. 400, 73 N. W. 731; *First Nat. Bank v. Lamont*, 5 N. D. 393; *Omlie v. Toole*, 16 N. D. 126.

"A mortgage given for a pre-existing debt of the husband without any new consideration is without consideration and unenforceable." *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028; *Wilhelm v. Schmidt*, 84 Ill. 183; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833; *Kansas Man. Co. v. Grandy*, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; 32 Cyc. 54.

"As a past due consideration is no consideration at all a surety who executed the instrument after its delivery is not bound." *Bridges v. Blake* (Ind.) 6 N. E. 833.

*A. T. Faber*, for respondent.

Proof of the execution and delivery of the mortgage established a prima facie case, and it devolved upon appellant to show want of consideration, and the proof of the same must be clear and convincing. *Braz v. Connor*, 82 Ala. 183; *Leffman v. Brill*, 142 Fed. 44; *Roth v. Adams*, 185 Mass. 341.

An antecedent indebtedness of the principal is sufficient consideration for a note signed by the surety. *Altman, etc. Co. v. ———* (Mich.) 49 N. W. 486; *Nichols & Shepard v. Dedrick*, 63 N. W. 1110; *Bennett v. Ellis*, 83 N. W. 429.

An extension of time of payment to the debtor is a sufficient consideration to support a mortgage given by a third person and a covenant by him to pay the debt. *Forrester v. Parker*, 14 Daly, 208, 6 N. Y. Supp. 274.

The waiver of a right or forbearance to exercise the same is a sufficient consideration for a promise made on account of it. *Pollock v. Billing*, 131 Ala. 519; *White v. White*, 52 Ala. 401; *Gunther v. Gunther*, 181 Mass. 217; *Clakins v. Chambers*, 36 Mich. 320; *Union Trust Co. v. Synda*, 88 N. W. 407; *Hamer v. Sidway*, 124 N. Y. 538.

The waiver of a right of forbearance to sue may be in respect to a liability or debt of a third person, and not that of the promisor. *Biddle v. Hanna*, 25 Ala. 484; *Barringer v. Warden*, 12 Cal. 311; *Workey v. Sipe*, 111 Ind. 338, 12 N. E. 485; *Howe v. Taggart*, 113 Mass. 284; *Clakins v. Chandler*, 36 Mich. 320.

41 N. D.—5.

A benefit to a third person is a sufficient consideration for a promise. *Martin v. Black*, 20 Ala. 309; *Brown v. Tipton*, 64 Md. 275; *Traders Nat. Bank v. Parker*, 130 N. Y. 415; 9 Cyc. 335, 343.

An actual forbearance is evidence of an agreement to forbear, and it is of no moment that no set time is specified. The law presumes a reasonable time. *Boyd v. Freize*, 5 Gray, 553; *Strong v. Sheffield*, 144 N. Y. 392; *Ford v. Crunter*, 18 S. W. 1034; *Security Nat. Bank v. Pulver*, 155 N. W. 641; *Roberts v. Bauer*, 35 La. Ann. 453; *Croft v. Bunster*, 9 Wis. 503; *Re New York*, Fed. Cas. No. 18,138; *Schafer v. Glade*, 195 Ill. 62; *Wood v. Conit*, 34 N. Y. 434; *Text and Notes Am. & Eng. Enc. Law*, 243 to 249.

GRACE, J. Appeal from the judgment of the District Court of Mercer County, North Dakota, Honorable J. M. Hanley, Judge.

This is an action to recover the sum of \$500 with interest on a certain covenant contained in a mortgage on land signed by the defendants. The facts in the case are as follows:

Dittus Brothers was a copartnership engaged in the machinery business. The defendant, William H. Rettke, became indebted to them in the sum of \$500 for said machinery, and on the 3d day of May, 1910, he gave Dittus Brothers his note for \$200 payable June 1, 1910, and on the same day gave his note to them for \$300 payable October 1, 1910. He was a single man at this time and was the owner of the N.W.  $\frac{1}{4}$  of section 34, township 143, range 88. After the execution and delivery of said notes, and on the 29th day of October, 1910, he married, and the other defendant in this case, Johanna Rettke, is his wife. After their marriage, they moved to and continued to live upon the land hereinbefore described and were living thereon at the time of the execution and delivery of that certain real estate mortgage upon said land, which contained the covenant, to recover upon which this suit is brought.

The complaint states the cause of action by setting out therein the terms of the notes which were executed and delivered by William H. Rettke at the time stated, and the further cause of action upon the covenant contained in the mortgage which was executed and delivered the 22d day of August, 1911, and which was afterward recorded in the office of the register of deeds in Mercer county. At the time

Johanna Rettke married William H. Rettke, she was the owner of her separate property, among which was certain land which she had proved up as a government homestead.

Defendant William H. Rettke, for his separate answer, admitted the execution and delivery of the notes but pleaded as a bar to any recovery thereon, his discharge as a bankrupt, under the Uniform National Bankruptcy Act. That he was discharged from all his debts and obligations is undisputed. It is admitted that he was discharged in bankruptcy. This being true, he was discharged from all provable debts against his estate in bankruptcy contracted prior to the time he was so adjudged to be bankrupt. The present action as to him was dismissed.

The covenant in the mortgage in question upon which recovery is sought against Johanna Rettke, reads thus:

"And said William H. Rettke and Johanna Rettke, his wife, do further covenant and agree to and with the said parties of the second part, their heirs, executors, administrators and assigns, to pay said sum of money above specified, at the time and in the manner above mentioned together with all the costs and expenses."

The amount specified in the mortgage is \$500 and was according to the condition of two notes which are the identical notes heretofore referred to and which were signed only by William H. Rettke. The defendant, Johanna Rettke, by her separate answer, interposed as her defense to any recovery upon the covenant in question: First, a total want of consideration; second, that her signature to the mortgage was procured by false and fraudulent representations upon which she relied and by which she was deceived, and that she was unable to read English and relied upon the Dittus Brothers to tell her the meaning of what the said mortgage contained, and that she was deceived by said Dittus Brothers in the amount of the notes described in the mortgage; that the plaintiff bought the mortgage after the maturity of the notes. The mortgage, after its execution and delivery, was assigned by written instrument by the Dittus Brothers to the plaintiff in this action.

After the close of the testimony the plaintiff moved for a directed verdict in his favor against the defendant, Johanna Rettke, for the sum of \$500 with interest thereon from May 3d, 1910, at 10 per

cent, which amount was the sum of the two notes executed by defendant, William H. Rettke, at the time and in the manner hereinbefore stated. The defendant, Johanna Rettke, moved for a directed verdict in her favor on the ground that there had been no showing of any new consideration for her covenant in the mortgage to pay their debt. Both parties having moved for a directed verdict, the trial court held that the action became a court case so far as the defendant, Johanna Rettke, is concerned. The defendant, Johanna Rettke, interposed some further defenses which we do not deem material to consider. The court, after due consideration, entered judgment against defendant, Johanna Rettke, for the full amount demanded. She has perfected an appeal to this court from such judgment. The questions presented in this appeal are: What is the relation of Johanna Rettke to the transaction? What, if any, is her liability? The answers to these two questions will dispose of the case.

We have no hesitancy in stating that her relation to the transaction is that of surety. It is stated in the syllabus of the *People's State Bank v. Francis*, 8 N. D. 369, 79 N. W. 853, that "where Francis executed certain promissory notes and a mortgage upon certain real estates belonging to himself to secure the same, and, at his request, his wife also executed the mortgage, and the mortgage contained an express covenant that the mortgagors would pay the debt thereby secured in accordance with the terms of said notes, but the wife did not sign the notes, and the mortgagee knew that the debt secured was the debt of Francis, the obligation assumed by the wife in the covenant, contained in the mortgage was, to the knowledge of the mortgagee, that of surety for Francis." In that case, Mrs. Francis declined to sign the notes. She signed the mortgage on the statement of the parties representing the bank that they desired to shut out any right of dower Mrs. Francis might have.

Among other questions asked the defendant, Johanna Rettke, were the following:

Q. Did you say that you would have to sign the mortgage to make it good on the homestead?

A. Yes.

Q. On his homestead?

A. Yes.

The testimony of defendant, Johanna Rettke, also tends to show clearly that she would not have signed the mortgage had she believed that it would have affected her own property. In other words, create a liability which might be collected from her out of her own separate property. Agnes Johnson, a daughter of the defendant, Johanna Rettke, testified that Dittus, at the time of the execution of the mortgage on the 17th day of August, 1911, told her (Johanna Rettke) it would not affect her claim any or any of her property if she would sign it. On the cross-examination of Emmanuel Dittus, there is the following testimony:

Q. What time of the day was it when you got out there?

A. You got me on that.

Q. You don't remember the time of the day?

A. I think it was in the forenoon.

Q. Did you tell Mrs. Rettke that this mortgage was a mortgage on her husband's place?

A. No, I did not.

Q. Did Mr. Nathan tell her that? Did he tell her that without her signature on this mortgage it would not be a valid mortgage on her husband's place?

A. Yes.

Q. Did she first refuse to sign it?

A. I think she said if it won't affect her quarter she would sign it.

Q. She said she would not or she did not want to become liable for her husband's debts?

A. No.

Q. She was willing to become liable for her husband's debts?

A. She agreed.

Q. She said, "I will agree to pay it but I don't want it to affect my land?"

A. No.

Q. Did she say that she did not want to become liable for any of her husband's debts contracted before her marriage?

A. No.

We think the effect of the testimony as a whole is to show that

Johanna Rettke signed the mortgage to make it good against the land in question, the land at the time of the execution of the mortgage in question being a homestead under the laws of this state, and that the testimony further clearly shows that she did not intend to become personally liable for the payment of the debt of her husband nor assume any personal liability so that her husband's debts might be realized upon or out of her separate property. In any event, we do not believe there was any consideration for the mortgage at the time of the execution and delivery of it. The husband's debts to Dittus Brothers, that is, the notes, were long past due, there had been no extension of time of payment of the same; there was no new consideration; there was no independent consideration to make it obligatory upon the surety; she received no part of the consideration of the notes, and the contract, that is, the mortgage, was entered into long after the notes had been executed and delivered and accepted by the payee, and long after they had become past due; and there was no surrender by the Dittus Brothers at the time of the taking of the mortgage of any existing legal right. In the case of *Bank of Carrollton v. Latting*, 37 Okla. 8, 44 L.R.A. (N.S.) 481, 130 Pac. 144, it is said in the syllabus:

"The signing of a note as surety some days after the principal had executed the same and after the delivery and acceptance thereof and after the consideration had passed without any agreement that the surety's name would be secured to the note, is without consideration."

"When a note has been fully executed and delivered and subsequently thereto, a new party signed it as surety, there must be an independent consideration to make it obligatory upon the surety. The defendant's contract (whether it be that of guarantor or surety) having been entered into after the note had once been delivered and accepted by the payee, and the transaction had become fully executed, required proof of a distinct consideration to support it; and, in the absence of evidence tending to establish a new consideration, the undertaking is *nudum pactum*."

The note in the L.R.A. report above referred to, is as follows:

"Necessity of new consideration to bind third person who signs as surety, endorser, or guarantor, after execution and delivery of orig-

inal contract by principal," then follows abundant and unlimited authority supporting this principle.

In the case at bar, defendant, Johanna Rettke, is a surety, and the mortgage which she signed without any new or independent consideration long after the delivery of the notes by her husband to the Dittus Brothers and long after the maturity thereof, is, as we view it, wholly without consideration. We are of the opinion, also, that there being no consideration for the execution and delivery of the mortgage, it is entirely unnecessary to discuss the question of fraud. As we view the case, the fact that there was no consideration for the mortgage, as has been fully shown, fully disposes of the case.

Judgment appealed from is reversed and the case is remanded for further proceedings in harmony with this opinion. Appellant is allowed the statutory costs on appeal.

ROBINSON, J. (concurring). The defendant Johanna Rettke appeals from a judgment against her on a covenant in a mortgage which was made to Dittus Brothers, and by them assigned to the plaintiff. The mortgage was made to secure two past due promissory notes made by William Rettke to Dittus Brothers for \$200 and interest at 12 per cent, and \$300 and interest at 12 per cent. It was made and dated August 17, 1911. It was made subject to mortgages for \$1,000, \$500 and \$300 interest,—on N. W. quarter of 34-143-88. This was the homestead of appellant and her husband. The mortgage contains a description of the promissory notes, and, in small five or six point letters, a covenant "to pay the sum of money above specified at the time and in the manner above specified." The covenant is one of twenty-one lines in the small type.

The defenses of appellant are: (1) That her signature to the covenant was obtained without her knowledge by artifice and false representations; (2) that she received no consideration for the covenant.

As the record shows when appellant signed the mortgage, she was the wife of the maker of the notes, who was a bankrupt and was subsequently discharged in bankruptcy proceedings. The quarter section was the homestead of the appellant and her husband. She had been left a widow with some property which she refused to mortgage or encumber. She was a German woman who could not read Eng-



lish and she signed the mortgage to waive her homestead rights, and did so, relying on representations that she incurred no personal liability. Of course, there is a dispute on that point, but the testimony of the plaintiff, her mother, and her husband, is entirely convincing.

The Dittus Brothers were business men and so was the notary public who represented them and prevailed on the plaintiff to sign the mortgage. Assuredly they would never have taken the mortgage to secure such past due paper, if they had thought it possible to induce the appellant to sign a renewal note. It is entirely certain the appellant never received any consideration for a covenant to pay the notes. We vainly search the complaint, the findings of the court and the testimony for any averment or proof of a consideration. Moreover, the appellant was under no legal or moral obligation to pay the notes.

A contract or covenant is an agreement to do or not to do a particular thing. Comp. Laws, § 5836.

It is essential to the existence of a contract that there should be a sufficient consideration. Comp. Laws, § 5837.

The consent of parties to a contract must be free and mutual and communicated by each to the other. Comp. Laws, § 5842.

Consent is not free when obtained by mistake of law or fact or a mistake of law by one party of which the others are aware at the time of contracting, but which they do not rectify. Comp. Laws, § 5855.

The consideration of a contract is any benefit to the promisor or any prejudice to the other party. Comp. Laws, § 5872.

Here there is no showing of benefit to the mortgagor, nor of prejudice to the mortgagee. There is no showing that appellant ever knew of the covenant to pay the mortgage debt. There is a showing that by artifice, Dittus Brothers and their notary public induced the appellant to sign the mortgage. They knew that she signed it under a mistake of law and fact which they had induced and did not attempt to correct. Of course, the mortgage was not negotiable, and the present holders stand only in the place of the mortgagees.

The judgment should be reversed.

McLEAN COUNTY, a Municipal Corporation, Respondent, v.  
JOHN RATHJEN, Appellant.

(169 N. W. 580.)

**Old highway—relocated, surveyed and improved—by county commissioners—at county expense—crossing defendant's land—acquiescence in by defendant—obstructing highway—public nuisance—injunction.**

By the county commissioners of McLean county an old highway crossing the land of defendant was relocated, surveyed, and improved at great expense to the county, and for more than ten years defendant acquiesced in such relocation. Hence, it was entirely proper that he should be enjoined from committing a public nuisance by obstructing the highway.

Appeal from the District Court of McLean County; Honorable *J. M. Hanley*, Judge.

Defendant appeals.

Affirmed.

*J. A. Hyland*, for appellant.

To lay out or to re-establish an old highway, a legal petition is necessary and notice of hearing and a proper hearing thereon. Neither can there be a legal highway until the proper order is made and filed establishing it. Laws 1899, §§ 1055, 1056, 1058, 1060, Comp. Laws, 1913, § 1929.

These are jurisdictional requirements and the county commissioners having failed to comply therewith renders their proceedings entirely void. *Semerad v. Dunn County*, 35 N. D. 437, 160 N. W. 855; *Dunstan v. Jamestown*, 7 N. D. 1, 72 N. W. 899; *Butler v. Barr*, 18 Mo. 357; *Phibbs v. State*, 7 Blackf. 513.

Commissioners appointed to lay out a highway must file a plat of the same in office of the clerks of the towns through which the highway was surveyed; they must have a hearing on the petition; they must give interested parties notice of such hearing; they must make a record of the order approving the survey and the route of same, and they must make and file their order laying out such highway. Their failure to do these things renders their act a nullity. *Prescott v. Byer*, 34 Minn. 49, 26 N. W. 732; *Elliott, Roads & Streets*, 402; *Commissioners v. Barry*, 66 Ill. 496; *Dolphin v. Pedley*, 27 Wis.

469; *Poole v. Breese*, 114 Ill. 594, 3 N. E. 714; *Wright v. Commissioners*, 145 Ill. 48, 33 N. E. 876; *Lyle v. Chicago, M. & St. P. R. Co.* 55 Minn. 223, 56 N. W. 820; *Sherman v. Highway Comrs.* 91 Mich. 480, 51 N. W. 1122; *Ft. Wayne v. Ft. Wayne & J. R. Co.* 149 Ind. 25, 48 N. E. 342; *Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. 547.

Statutes authorizing the establishment of highways insofar as they authorize the taking of private property, must be strictly construed. There is no presumption in favor of such acts. *Curran v. Shadduck*, 24 Cal. 427; 37 Cyc. 53; *Funderburk v. Spengler*, 234 Ill. 574, 85 N. E. 193; *Williams v. Giblin*, 56 N. W. 644; *Isham v. Smith*, 21 Wis. 32; *State v. Castle*, 44 Wis. 670; *Ruhland v. Hazel Green*, 55 Wis. 664, 13 N. W. 877.

Even where an order is made and filed establishing a highway, it is not conclusive of anything. It is at most only *prima facie* evidence of the purported fact. *Roehbrodn v. Schmidt*, 16 Wis. 519; *Williams v. Mitchell*, 49 Wis. 284, 5 N. W. 798; *State v. Lague*, 73 Wis. 598, 41 N. W. 1061; *State v. Harland*, 74 Wis. 11, 41 N. W. 1061.

Where the existence of a highway is in dispute, in an action to restrain the road overseer from removing plaintiff's fences, the burden of proof is on defendant to establish the fact of a legal highway. *VanWanning v. Deeter* (Neb.) 112 N. W. 902.

*John E. Williams*, State's Attorney, and *Wm. Langer*, Attorney General, for respondent.

The highway here in question is an old, established, well-traveled roadway. It has been in existence and used as a highway for thirty years.

During that time slight deviations have been made but it has always remained the same highway, running in the same directions and connecting the same objective points, and has been continuously used by the public and by the defendant himself as a highway, and has been maintained and improved at the public expense. It is a legal highway. *Walcott Twp. v. Skauge*, 6 N. D. 382, 71 N. W. 544; *Burleigh County v. Rhud*, 23 N. D. 362, 126 N. W. 1082; *Taeger v. Riepe*, 90 Iowa, 484, 57 N. W. 1125; Code 1915, § 1928.

"An injunction cannot be maintained to prevent the establishment of a highway by one who has filed a claim for damages on account of

the establishment thereof." *Davis v. Boone County*, 28 Neb. 837, 45 N. W. 249; *Dettmar v. Pittenger* (Neb.) 132 N. W. 407; *State v. Wertzel* (Wis.) 22 N. W. 150.

By defendant's use of and acquiescence in the highway there was a dedication of the land to the public as a highway. *Gerberlin v. Wunnenberg*, 51 Iowa, 125, 49 N. W. 861; *Ryan v. Kennedy*, 62 Iowa, 37, 17 N. W. 142; *State v. Waterman*, 79 Iowa, 360, 44 N. W. 677.

In such cases "the right of the public does not rest upon a grant by deed, nor under possession for the statutory period of time, but upon the use of the land with the consent and assent of the owner for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Greenl. Ev.* ¶ 662; *Case v. Farier*, 12 Minn. 89; *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955; *Lonaconing R. Co. v. Consolidation Coal Co.* 95 Md. 630, 63 Atl. 420.

ROBINSON, J. Pursuant to a contract of purchase made in 1890 defendant owns section 33 in township 144 of range 81 in McLean county. The land is adjacent to the banks of the Missouri river and in places along the south and west section lines it is rough and intersected by streams or creeks so that the south and west section lines have not been opened and used as a public highway. Hence, the highway on the south of the east half of the section is a little south of the section line, and from the southwest corner of the southeast quarter, the highway runs north of northwest until it crosses the west line of the section some 120 rods south of the north line, and then it runs north and parallel to the western line.

This is a part of the main road from Wilton to Washburn. It is a continuation and relocation of an adjacent road which for some forty years was located, used, and traveled in the same general direction across said section, and such relocation was duly surveyed, made permanent by order of the county commissioners of McLean county pursuant to a petition duly filed with the county auditor in the year 1900. On such petition road viewers were duly appointed. They made a report to the county commissioners in favor of such relocation and

the report was accepted and approved. Doubtless an order of relocation was duly made, but in 1905 the courthouse was burned and many of the records were destroyed. The county commissioners went on, improved the road, permanently located the same, and contracted for and caused to be constructed on the line of the road a combination steel and iron bridge 65 feet in length at a cost of \$2,000, and they expended several hundreds of dollars in grading the approaches to the bridge.

The present relocation was of great benefit to the defendant because it vacated the adjacent road across said section where the land is more valuable than at the present location, and it shortened the road by making it more direct and left defendant free to use the south and western section lines. The defendant did not appeal from or protest against said permanent location nor against the construction of the bridge or the survey and improvement. Indeed, he acknowledged and acquiesced in the relocation by constructing fences along the highway and by demanding compensation for the site of the same, but, as the county commissioners did not award him damages, since 1915 or 1916 he has on occasions attempted to obstruct the use of the highway, though any such obstruction is a public nuisance.

Under the statute any person feeling aggrieved by an order of the county commissioners in locating a highway or in making an award of damages has a right of appeal, and in case no appeal is taken, then, after the lapse of one year, the order of the county commissioners in altering or discontinuing a highway becomes final. Highways are a public necessity, and the highway in question is a necessity and a convenience to the public and to the defendant himself. He knew, or should have known, of the location of the highway and the building of the bridge and its approaches, and he acquiesced in the same, and he has sustained no damages.

Hence it was entirely proper that he should be enjoined from committing a public nuisance by obstructing the highway. The case is entirely clear and needs no argument or citation of authorities.

Judgment affirmed.

GRACE, J. I concur in the result.

CHRISTIANSON, J. (concurring specially). A careful consideration of the evidence in this case leads me to the conclusion that the defendant ought to be enjoined from obstructing the highway involved in this controversy. I am therefore of the opinion that the trial court properly rendered judgment in favor of the plaintiff, and that such judgment should be affirmed.

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STATE OF NORTH DAKOTA, Respondent, v. FRANK FINLAYSON, Appellant.

(169 N. W. 581.)

**Preliminary examination — waiver thereof — necessary prerequisite to prosecution — by criminal information — defense charged — committed during term of court — same county — exception to rule.**

1. Barring the exceptional cases enumerated in § 10,628, Comp. Laws 1913, a preliminary examination or a waiver thereof is a necessary prerequisite to a prosecution by criminal information, unless the offense charged "is committed during the continuance of the term of the district court in and for the county or the judicial subdivision in which the offense is committed or triable."

**Criminal prosecution — by information — preliminary examination if not waived — prerequisite to — setting aside information — motion for — error.**

2. For reasons stated in the opinion it is *held* that the defendant was entitled to a preliminary examination for the crime charged in the information, and that it was error to deny a motion to set aside the information based upon the ground that a preliminary examination had neither been had nor waived.

Opinion filed November 4, 1918. Rehearing denied November 29, 1918.

From a judgment of the District Court of Kidder County (on change of venue from Burleigh County), *Crawford*, Special Judge, defendant appeals.

Reversed.

*Theodore Koffel*, for appellant.

The defendant was put upon trial on information, without having

had, or waived, a preliminary examination. Defendant moved to set aside the information on such ground, and the court erred in denying such motion. *State v. Winbauer*, 129 N. W. 97, 21 N. D. 161.

It is not charged or claimed that the crime described in the information was committed during the session of any term of court. *Comp. Laws 1913*, § 10,628; *State v. Rozum*, 8 N. D. 550; *Latimer v. State (Neb.)* 76 N. W. 227; *People v. Evans (Mich.)* 40 N. W. 473; *People v. Nogari*, 142 Cal. 596, 76 Pac. 490; *State v. Julius*, 29 S. D. 638, 137 N. W. 590.

The complaint does not state facts sufficient to constitute a public offense. There is no statement of time, place, or manner of former conviction, nor was the information verified at time of filing. *State v. Julius*, *supra*; *State v. Heffernan (S. D.)* 118 N. W. 1027; *State v. O'Neal*, 19 N. D. 428, 124 N. W. 62; *State v. Markuson (N. D.)* 73 N. W. 82.

The denial of defendant's motion to set aside the information was an abuse of discretion on the part of the trial court and requires a reversal. *State v. Dahms*, 29 N. D. 51, 149 N. W. 965; *State v. Hall*, 28 N. D. 649, 149 N. W. 970.

No judgment having been entered, there is no legal authority for either committing the defendant or holding him under bonds.

The power of the court to enter judgment ended with the term. *Black*, *Judgm.* § 306; *Freeman*, *Judgm.* § 96.

*Wm. Langer*, Attorney General, and *F. E. McCurdy*, State's Attorney, for respondent.

The citations of appellant from *Black on Judgments* relate only to civil actions, and have no bearing upon questions here involved. *Black*, *Judgm.* § 306; *Freeman*, *Judgm.* § 96.

CHRISTIANSON, J. The defendant was convicted of the crime of keeping and maintaining a common nuisance, as a second offense contrary to the provisions of the prohibitory laws of this state, and he appeals from the judgment of conviction.

In his first assignment of error he urges that the court erred in denying his motion to set aside the information. The motion to set aside the information was based upon the ground that the defendant

had neither had nor waived a preliminary examination for the offense for which he was convicted or for any offense.

The information was filed by the state's attorney on January 22, 1917. It charged the defendant with keeping and maintaining a common nuisance, at a certain designated place, "on the 22d day of January, in the year of our Lord one thousand nine hundred and fifteen, and continuously from thence to and including the 22d day of January, nineteen hundred and seventeen." It is conceded, and the record shows, that the defendant never had or waived a preliminary examination, and he filed a written motion to set the information aside upon this ground, before demurring or pleading to the information.

Under our statute, "the information . . . must be set aside by the court in which the defendant is arraigned, upon his motion . . . in all cases when the defendant is entitled to a preliminary examination before a magistrate, before the filing of such information, when he has not had such examination and been held to answer before the district court, or has not waived such examination in writing, or orally before a magistrate." Comp. Laws 1913, § 10,728.

The defendant in a criminal action has no constitutional right to a preliminary examination (*State v. Hart*, 30 N. D. 368, 152 N. W. 672); but our statute, makes such examination (subject to certain enumerated exceptions not applicable to the case at bar), a necessary prerequisite to a prosecution by information, unless such examination is waived or the crime charged "is committed during the continuance of the term of the district court in and for the county or the judicial subdivision in which the offense is committed or triable." Comp. Laws 1913, § 10,628, subd. 4. The information in this case does not charge that the crime was committed, and the prosecution was not restricted in its proof to acts committed during the continuance of a term of the district court; but the prosecution might introduce evidence tending to show that the defendant maintained the common nuisance in question upon one day, or on any or all of the days, included in the period of time properly covered by the information. *State v. Webb*, 36 N. D. 235, 162 N. W. 358; *Scott v. State*, 37 N. D. 90, L.R.A.1917F, 1107, 163 N. W. 813. See also *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97.



The defendant was entitled to a preliminary examination. He did not waive such examination, nor did he waive the right to object because such examination had not been given. He made a seasonable motion to set aside the information on the ground that he had neither had nor waived such preliminary examination. The defendant was denied a right guaranteed to him by the laws of this state, and this necessitates a reversal of the judgment appealed from. This disposes of the appeal and it becomes unnecessary to pass upon any of the other errors assigned. Reversed and remanded for further proceedings in accordance with law.

### On Petition for Rehearing.

CHRISTIANSON, J. Plaintiff has filed a petition for rehearing, wherein it is contended that "where an offense is of a continuing nature and a part of it within the time court is in session, and the other part extends over, an information for such offense may be filed directly in the district court without a preliminary examination first being had." We have given the question presented our consideration, and find no reason to recede from our former decision. The statutes relating to preliminary examinations make no distinction between a continuing offense and one, the commission of which consists of the performance of an individual act. In either case the accused is entitled to a preliminary examination, unless the case falls within one of the exceptions, or the accused waives such examination. And in a case where a defendant is entitled to a preliminary examination, and does not waive it, he can be prosecuted by information only for the offense upon which he "has had a preliminary examination or for an offense included in such charge." 12 Cyc. 305.

It is, also, contended that no prejudice has been shown for the reason that the trial court might have excluded all evidence relating to any period of time except that embraced within the continuance of a term of court. The same contention was also made, and held to be unsound by this court in *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97.

The former opinion will stand. A rehearing is denied.

JOHN MOUGEY, Appellant, v. HUGH MILLER and M. J. Cooney, Jr., Copartners as Miller & Cooney, Respondents.

(169 N. W. 735.)

**Judgment — setting aside — motion for — unsupported by affidavit of merits — no proposed verified answer — no fraud shown — discretion of court — abuse of, in making order setting aside judgment.**

Where a motion is made to set aside and vacate a judgment and such motion is not based upon an affidavit of merits, and there is no proposed verified answer, and there is no fraud in the procuring of the judgment, it is clear abuse of discretion of the trial court to grant such motion setting aside and vacating the judgment.

Opinion filed November 29, 1918.

Appeal from the District Court of Ransom County, North Dakota, Honorable *Frank P. Allen*, Judge.

Reversed.

*E. T. Burke*, for appellant.

*C. G. Bangert*, for respondents.

GRACE, J. Appeal from the district court of Ransom county, North Dakota, Honorable Frank P. Allen, Judge.

This is an appeal from an order vacating a default judgment entered August 21, 1917, for \$1,431.50. Mougey brought an action against Miller and Cooney, copartners doing business under the firm name and style of Miller & Cooney, and, in the complaint, states a cause of action upon two notes as follows: "That on or about the 5th day of November, 1916, defendants made, executed, and delivered to plaintiff its promissory note, in writing, dated on or about said date in the sum of \$270, payable upon demand with interest at 10 per cent per annum; that the same has not been paid nor has any part thereof, but the defendants remain indebted to plaintiff in said sum and interest thereon. That on or about the 4th day of February, 1917, the defendants made, executed, and delivered to one Michael Cooney, Sr., their certain promissory note, in writing, whereby they promise to pay to him the sum of \$1,100 upon demand, with interest after date at the rate of 8 per cent per annum; that the said note has

41 N. D.—6.

not been paid nor has any part thereof; that on or about the 12th day of April, 1917, and before the commencement of this action, the said Michael Cooney, Sr., for a valuable consideration, assigned, sold, and delivered to this plaintiff the said note, and that plaintiff thereupon became, and still is, the owner and holder thereof."

The notes offered in evidence were: a note of \$250, dated November 6, 1916, signed by M. J. Cooney, Hugh Miller, and J. A. Mougey, and a note signed by M. J. Cooney, and containing the following indorsement on the back thereof: "M. Cooney, Sr., to John Mougey, April 12, 1917."

The smaller note set forth in the complaint is claimed to have been executed and delivered by the defendants to the plaintiff, whereas the note in evidence was signed by M. J. Cooney, Hugh Miller, and J. A. Mougey, and also bears a different date from the \$270 note in the complaint. The complaint also alleges that the defendants executed and delivered to Michael Cooney, Sr., the \$1,100 note. On the \$1,100 note offered in evidence there is a signature of no maker except that of M. J. Cooney. The complaint further, in effect, alleges that the smaller note of \$270 was executed and delivered by the defendants to plaintiff while the smaller note offered in evidence is a note executed by M. J. Cooney, Hugh Miller, and J. A. Mougey to the Farmers State Bank of Sheldon, and contains no indorsement.

There appears to be much discrepancy between the notes offered in evidence and those described in the complaint; conceding there is, the notes offered in evidence, though they did not correspond in many respects with those described in the complaint, were received in evidence by the court. There is nothing in this record sufficient to show any fraud in offering, as evidence, the \$250 note and the \$1,100 note which are part of the record; nor is there anything in the record sufficient to show that the court vacated the judgment because of any fraud practised upon it. There is nothing in the record, so far as we can determine, sufficient to show that the judgment was obtained by fraud or collusion or that the court was in any manner imposed upon. It is certain in cases where the court is deceived, and collusion and fraud is practised so that the court ordered a judgment while laboring under the deception and fraud practised in the procuring of the order of the court and the judgment, that it has inherent power to

vacate and set aside such collusive and fraudulent judgment, notwithstanding that more than one year has elapsed since the entry. *Williams v. Fairmont School Dist.* 21 N. D. 198, 129 N. W. 1027.

In this case, as we view it, from the record there is no showing of fraud or collusion in procuring the judgment, nor that the court was in any way deceived or fraud practised upon it. This being true, the court abused its discretion in setting aside and vacating the judgment in question, unless the defendant has brought himself within the terms of § 7483, Compiled Laws 1913, part of which is as follows: "The court may likewise, in its discretion and upon such terms as may be just . . . at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding."

What then should the defendant have done to have brought himself within this statute? The proper procedure to obtain relief from a default judgment is by motion to vacate the judgment, based on affidavit of merits, and a proposed verified answer. *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228. In the case at bar, defendants have neither an affidavit of merits nor a proposed answer. They have entirely failed to comply with requirements necessary and indispensable in a motion to vacate a judgment. This being true, the trial court should have denied their motion to vacate the judgment, and, under the circumstances in this case, its failure to do so is a clear abuse of discretion.

Nothing in this decision is to be understood as preventing the trial court of its own motion, if it deems it was deceived or imposed upon at the time of the procurement of the judgment, in making another order vacating the judgment, wherein it will appear on the records of the trial court that it was so imposed upon and deceived. We have hereinbefore pointed out in this opinion that a judgment may be vacated even after the expiration of one year, where it is made to appear that the trial court was imposed upon or deceived at the time of the entry of such judgment.

The order of the trial court vacating the judgment is reversed and the judgment vacated is reinstated. Appellant is allowed his statutory costs on appeal.

ROBINSON, J. (dissenting). In this action on August 21st, 1917, a default judgment was entered that the plaintiff recover from Hugh Miller and Michael J. Cooney, copartners doing business under the firm name of Miller & Cooney, the sum of \$1,431.50. The judgment was on a promissory note dated November 2, 1916, by M. J. Cooney and Hugh Miller and John Mougey to the Farmers State Bank of Sheldon for \$250 and interest payable on demand. This note bears no indorsement, and it is not the note described in the complaint.

The other note is dated February 4, 1917, made by M. J. Cooney to M. Cooney, Sr., for \$1,100 and interest on demand. It is indorsed thus: M. Cooney, Sr., to John Mougey, April 12, 1917. This is not the note described in the complaint. It describes a note made by the defendants, and not by Cooney. The judgment was entered on an admission of service by M. J. Cooney, who made the note to his father.

A motion to vacate the judgment is dated April 15, 1918, and on June 1st, 1918, the court made an order that the judgment be in all things vacated, set aside, and annulled. On July 1, 1918, the plaintiff appealed from the order, assigning error "that the facts before the court conclusively show that the plaintiff was entitled to the judgment, and the failure of one of the defendants to sign one of the notes does not warrant an order vacating the judgment." But the judgment was against the defendants as partners, and the notes show no partnership liability, and the note to the State Bank of Sheldon is not indorsed to the plaintiff or to any person. Manifestly, the appeal has no merit, and the wonder is that any attorney should ever take such a judgment or take an appeal from an order vacating it or try to bolster up the judgment by a statement of facts not in the judgment roll.

On the judgment roll and the promissory notes, the judgment does appear as an imposition on the court, and as such it was entirely proper for the court to set it aside, even on its own motion.

F. M. DAVIS, Receiver of the Farmers & Merchants State Bank of Denhoff, North Dakota, a Corporation, Respondent, v. E. JOHNSON, Appellant.

(170 N. W. 520.)

**Insolvent bank — stockholders of — statutory liability — receiver may enforce.**

1. Under the laws of this state the receiver of an insolvent bank may enforce against stockholders the added statutory liability prescribed by § 5168, Compiled Laws 1913.

**Stockholder — judgment against — evidence and findings — sufficient to support.**

2. It is *held* that in the instant case the evidence and findings justify a judgment against the defendant as a stockholder in an insolvent bank for the amount of such added statutory liability.

Opinion filed November 30, 1918.

From a judgment of the District Court of Sheridan County, Honorable W. L. Nuessle, Judge, defendant appeals.

Affirmed.

*Geo. Thom, Jr.*, for appellant.

The receiver of an insolvent corporation, a bank, has no title or interest in the matter of the statutory liability of the stockholders of such bank, and he cannot maintain an action against a stockholder to recover on such liability.

This right only exists in the creditors of the bank. Comp. Laws 1913, §§ 7995–7998.

And the court may compel all the creditors to come in as parties and

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**NOTE.**—The weight of authority sustains the rule that the statutory added liability of holders of corporate shares of stock, in addition to the par value thereof, is not a corporate asset, but a secondary or collateral liability, flowing directly to, and to be enforced by, creditors, and that a receiver, assignee, or trustee of an insolvent corporation cannot, in the absence of express statutory authority, recover it, as will be seen by an examination of a note in 31 L.R.A.(N.S.) 365, on right of receiver, assignee, or trustee to recover statutory added liability of corporate stockholder.

present and prove their claims. Comp. Laws 1913, § 7321; 7 R. C. L. art. 373; *McLoughlin v. O'Neill* (Wyo.) 51 Pac. 243; 34 Cyc. note 13 and cases cited; 31 L.R.A.(N.S.) 365, note and authorities.

A trustee in bankruptcy of a corporation cannot enforce the statutory liability of a stockholder, since it is not a corporation asset and does not pass to the trustee, but remains subject to the demands of the creditors, if the corporate assets are insufficient to discharge their claims. *Walsh v. Skanklin*, 125 Ky. 715, 102 S. W. 295; *Zang v. Wyant*, 25 Colo. 551; *Lane v. Morris*, 8 Ga. 468; *Wincock v. Turpin*, 96 Ill. 135; *Hammond v. Cline*, 170 Ind. 452; *Woodworth v. Bowles*, 61 Kan. 569; *Childs v. Cleaves*, 95 Me. 498; *Colton v. Mayer*, 90 Md. 711; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; *Palmer v. Bank of Zumbrota*, 65 Minn. 90; *Millisack v. Moore*, 76 Mo. App. 528; *Holcomb v. Tierney*, 79 Neb. 660; *Hirschfield v. Fitzgerald*, 157 N. Y. 166; *Finney v. Guy* (Wis.) 82 N. W. 595; *Wright v. McCormack*, 17 Ohio St. 86; *Ball v. Anderson*, 196 Pa. 86; *Steinke v. Loofbourow*, 17 Utah, 252; *Murtey v. Allen*, 71 Vt. 377; *Hale v. Allinson*, 188 U. S. 56; note in 31 L.R.A. (N.S.) 365.

When the statute provides a method of procedure, that method is exclusive. Sess. Laws 1915, House Bill 344; *Finney v. Guy* (Wis.) 82 N. W. 595.

The defendant was entitled to notice of the determination of the stockholders' statutory liability, and the court erred in holding to the contrary. No notice of the hearing before the court or of the order making the assessment was given defendant. Comp. Laws 1913, §§ 7995, 7998, 8000; 34 Cyc. 396.

*Harry E. Dickinson*, for respondent.

The statutory liability of stockholders of a corporation is no different in principle from the liability of the stockholder for his unpaid stock subscription; that both are trust funds for the payment of the corporate debts and should be collected and administered in the same manner. That the method provided by statute and relating to creditor's suits is not exclusive. This rule is sometimes known as the Washington rule and has been followed by many states. 31 L.R.A.(N.S.) 365, 368 note; *Wilson v. Book* (Wash.) 43 Pac. 939; *Watterson v. Masterson*

(Wash.) 46 Pac. 1041; *Shuey v. Adair* (Wash.) 64 Pac. 536; *Howarth v. Lombard*, 175 Mass. 570; *Smathers v. Bank*, 135 N. C. 410; *Barton Bank v. Atkins*, 72 Vt. 33; *Howarth v. Elwanger*, 86 Fed. 54; *Conway v. Savings Bank*, 165 Fed. 822; *State v. Union Stock Yards Bank* (Iowa) 70 N. W. 752; *Elson v. Wright* (Iowa) 112 N. W. 105; *Farmers Loan & T. Co. v. Funk*, 49 Neb. 353, 63 N. W. 520.

Wherever this liability is regarded and treated as a trust fund, this doctrine and method prevail. *State v. Union Stock Yards Bank*, 70 N. W. 752; *Farmers L. & T. Co. v. Funk*, 68 N. W. 520.

Such liability is not one direct to the creditors, but constitutes a trust fund for the debts of the bank which the receiver is authorized to collect and distribute. *Elson v. Wright* (Iowa) 112 N. W. 105; *Wilson v. Book*, 43 Pac. 939.

Courts now refuse to follow the old rule of exclusive liability to creditors, and have adopted new rules more in consonance with principle and convenience of procedure, and now the receiver may proceed either in equity or by separate suits at law. *Shuey v. Adair* (Wash.) 54 Pac. 536; *Comp. Laws* 1913, § 7995, et seq.; *John Miller Co. v. Harvey Mercantile Co.* 165 N. W. 558.

The action or proceeding which is authorized by our Code is similar to a creditor's bill. Its object and purpose is single, and that is to collect into a common fund the assets of the corporation. *John Miller Co. v. Harvey Merc. Co.* (N. D.) 165 N. W. 558; 7 C. J. 511 (85); *State v. Merchants Bank*, 70 N. W. 803; *People v. Bank*, 74 N. Y. Supp. 806.

Where a corporation has suspended business by reason of insolvency, and a receiver or trustee has been appointed by a court of equity, the court will, in accordance with the usual course of practice in chancery cases, take and state an account of the assets and liabilities of the corporation and of what is due from its shareholders in the aggregate, as well as of what is due from each individually, and on this basis make an interlocutory decree, ordering an assessment upon the shareholders to raise the money to liquidate its debts and to pay the attendant costs. Such decree is conclusive upon all shareholders, whether or not they were made parties or served with process. The theory is that the corporation is still, in a sense, their agent and that they are parties by



representation. 10 Cyc. 735 (3); 33 L.R.A.(N.S.) 910, note and cases cited; *Shaefe v. Lorimer*, 79 Fed. 921; 7 C. J. 515; *Uleland v. Haugen*, 73 N. W. 169; *Elson v. Wright*, 112 N. W. 105.

**CHRISTIANSON, J.** This is an action brought by the plaintiff as receiver of the Farmers & Merchants State Bank of Denhoff, an insolvent banking corporation, against the defendant as a stockholder in said bank, to enforce the liability created by § 5168, Compiled Laws 1913, which provides that the shareholders of every banking association organized under the laws of this state "shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association made or entered into to the extent of the amount of his stock therein at the par value thereof, in addition to the amount invested in and due on such shares. Such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders." The action was tried to the court without a jury and resulted in a judgment in favor of the plaintiff. Defendant appeals from the judgment.

The material facts are not in controversy, and may be summarized as follows: The defendant Johnson was the owner of ten shares of the capital stock of the Farmers & Merchants State Bank of Denhoff. On January 22d, 1913, he made a deal with one Hosick whereby the stock was assigned to Hosick, and it was on the same day transferred to Hosick on the books of the bank. It is conceded that Hosick at the time of the transfer was, and ever since has been, insolvent. On April 28th, 1913, the state examiner declared the bank to be insolvent and closed it and took charge of its assets. An action was subsequently commenced by the attorney general under the provisions of article 3, of chapter 27 of Code of Civil Procedure, to dissolve the corporation, sequester its property, and distribute its assets among those lawfully entitled thereto. The plaintiff was duly appointed receiver in such action, and thereafter duly qualified and entered upon the discharge of his duties as such receiver. The receiver caused notice to the creditors of the said insolvent bank to be duly published, notifying all of the creditors to present their claims against the corporation for allowance by the court, and thereafter, in June, 1916, plaintiff presented a veri-

fied application to the district court, showing the assets and the claims filed and approved against the bank, and averring that there would be a deficiency requiring the enforcement of the full amount of the additional stockholders' liability, provided by § 5168, Compiled Laws 1913. The court entered an order assessing each and every stockholder of the bank, shown by the records and books of the bank to be such stockholders on April 29th 1913, 100 per cent of the amount of stock held by such stockholders.

As already stated, it is conceded that Hosick, the transferee of the defendant's stock, is insolvent. It is also conceded that he has removed and is a resident of Canada, and that any assessment made on the Hosick stock would eventually have to be paid by the defendant, Johnson. It also appears that both Hosick and Johnson were notified of the assessment and demand made for the payment of the amount thereof.

The action was commenced in October, 1915. But the case was tried upon the issues framed by an amended complaint served in August, 1916, and an answer thereto served in September, 1916. On this appeal defendant contends that the judgment is erroneous and should be reversed for the reasons: (1) That the receiver of an insolvent bank has no interest in or right to enforce the statutory liability imposed upon stockholders by § 5168, Compiled Laws 1913, but that such liability is enforceable only in an action brought by a creditor or creditors; and (2) that the assessment made by the court in the case at bar is void for want of notice to the defendant. We will consider these propositions in the order stated.

1. Whether the receiver of an insolvent corporation may, in the absence of express statutory authority, enforce a statutory added liability of holders of corporate stock, is a question upon which the authorities have differed. The question is an interesting one, but in our opinion it is not involved in this case. For in this state the legislature has expressly provided that the receiver of an insolvent bank shall "enforce the individual liability of stockholders." Laws 1915, chap. 63. It is true this statute was enacted after the plaintiff had been appointed receiver, but it was in full force and effect at the time the instant case was commenced and the assessment laid against the defendant. The statute did not affect any right, but related merely to a remedy. The

liability of stockholders fixed by § 5168, Compiled Laws 1913, has not been changed in the least. Neither has the right of any creditor to receive the benefits provided by such statute been affected.

It will be noted that § 5168, Compiled Laws 1913, says nothing as to the means to be utilized in enforcing the liability provided therein. The section merely prescribes the right; it makes no reference to the remedy.

While this court has never passed upon the question, it appears to have been the practice of the banking department and of the district courts in this state to permit the receiver to enforce the superadded liability and distribute the moneys received through the receivership proceedings. And so far as we can ascertain the provision contained in chapter 53, Laws of 1915, constituted rather a legislative recognition of an existing method of enforcement than the creation of a new method of enforcement. But even though the enforcement by the receiver be deemed the addition of a new, cumulative remedy for the enforcement of the statutory liability, it might, and in our opinion would, still apply to the instant case. For it is well settled that the legislature may, within certain limits, alter, modify, or extend remedies, or add a new remedy for the enforcement of an existing right. See 12 C. J. 1088; Cooley, Const. Lim. 5th ed. pp. 348-357, 443; 6 R. C. L. p. 363; Orvik v. Casselman, 15 N. D. 34, 105 N. W. 1105; Scott v. District Ct. 15 N. D. 259, 107 N. W. 61; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365. The right provided by § 5168 is for the benefit of the creditors. The action brought by the receiver in this case is brought for the benefit of the creditors. And it appears that all creditors have appeared and filed claims with the receiver, and no creditor has objected to the receiver enforcing the statutory liability of the stockholders. The enforcement of the added liability by the receiver is manifestly the most desirable method and the one most in harmony with the scheme and spirit of our laws. It will better tend to protect and secure the rights of the different creditors of an insolvent bank than to require a creditor or creditors to enforce the added statutory liability against the different stockholders. All approved creditors of equal rank are placed upon an equal basis and will *ipso facto* receive the same proportionate shares. All questions of priority among creditors, predicated

upon the time in which suit is brought, are eliminated. Needless litigation and expense is avoided. The entire affairs of the corporation, including the adjustment of the liability of its stockholders, are subject to the control of and disposition by the court in a single action, and unnecessary delay and expense avoided.

2. There is no contention that the defendant, Johnson, was not a stockholder in the insolvent bank at the time the indebtedness due by the bank to the different creditors was incurred. Nor is there any contention that any of the claims allowed are fraudulent or that they do not constitute legal claims against the bank. It is true all the assets have not been applied in payment of the claims of the different creditors, although the greater portion has been so applied. From the very nature of the proceeding it is necessary for the court, in an action to dissolve an insolvent corporation and sequester its property and distribute its assets among the persons lawfully entitled thereto, to determine the liabilities and assets of the corporation. The primary purpose of the appointment of a receiver in such action is to enable the court to take possession of and distribute the property of the corporation among its lawful creditors. To carry out this purpose it must necessarily determine the validity and amount of the claims of the respective creditors; and, when it applies the assets under its control to the satisfaction of such claims, the amount of the deficiency is *ipso facto* determined. It does not necessarily follow, however, that an action may not be maintained to enforce the added statutory liability before all of the assets have actually been applied to the satisfaction of the claims of the creditors. "The exigencies of the matter before the court when administering upon an insolvent estate require it to exercise a wide discretion. Justice to the creditors demands that they should have the secondary as well as the primary assets made available for the satisfaction of their claims, and justice to the stockholders demands that the primary assets should not be sacrificed by their too hasty conversion into money. The court is thus confronted with two distinct, conflicting interests, each of which it is its duty to protect so far as lies within its power. It should not delay the settlement to such an extent as to render the secondary liability of no avail to the creditors, nor should it act with such haste as to unnecessarily in-

crease the burden of the stockholders; and if, in its attempt to harmonize these conflicting duties, it finds the amount of the difference between the liabilities and the assets by determining the amount of the one and the value of the other, rather than by the process of conversion and application, its order in that respect will not be held void in a collateral proceeding on the mere suggestion of irregularity, even if it would be so held on a direct appeal from the order." *Shucy v. Adair*, 24 Wash. 378, 64 Pac. 538.

It should be noted, however, that the statute under consideration does not require an assessment as a condition precedent to the maintenance of an action to enforce the added statutory liability. See *Bennett v. Thorne*, 36 Wash. 253, 68 L.R.A. 113, 78 Pac. 942. And it has been said that in such action "the plaintiff must make proof of the value of the assets and of the extent of the liability of the corporation." *Van Tuyl v. Schwab*, 172 App. Div. 670, 158 N. Y. Supp. 426.

The instant case was tried on that theory. There was no contention that the order levying the assessment was conclusive. But the questions upon which the defendant's liability depended were presented by the pleadings and determined by the court without regard to such order. Evidence was offered upon the question of the assets and liabilities and the extent to which the stockholders' liability ought to be enforced. And the defendant was afforded every opportunity to show that the added statutory liability ought not to be enforced against him either in whole or in part. The evidence and the findings clearly justified the judgment ordered in the case. The judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in result.

ROBINSON, J. (dissenting). This is an action under § 5168, Compiled Laws. It is in effect that the shareholders of a banking corporation shall be individually responsible, equally and ratably, and not one for another, for debts of the bank to the extent of the amount of his stock therein at par value, and *such individual liability shall continue for one year after any transfer of the stock*. The stock in question was duly transferred, and the transfer duly entered on the books of the bank

on January 22, 1913, and this action was commenced on the 11th day of October, 1915,—two years and nine months after the transfer of the stock. Now as more than one year had elapsed when the action was commenced, the liability had ceased to exist.

But if the defendant were liable under a proceeding and evidence, it is absolutely certain that his liability does not appear from any facts stated in the complaint, the findings of fact, or the evidence. There are no facts stated showing any debt or liability against the bank. True, it is stated that in a proceeding to which Johnson was not a party, in a suit by the attorney general against the bank, commenced April 28, 1913, the plaintiff was appointed a receiver of the bank; that he caused notice to be given to the creditors of the bank to present their claims for allowance by the court; that the court made an order allowing claims to the sum of \$12,546.65 and also \$295.46. And the court directed the receiver to pay a dividend of 50 per cent on the fact of the claims allowed, and made an order allowing the receiver \$4,000 and the attorney \$1,500. Thus, the court virtually turned over to the receiver and his attorney the total assets of the bank. Then, on June 13, 1916, on application of the receiver, the court made an order levying an assessment of 100 per cent on the par value of the stock, and defendant has refused to pay the same. Wherefore the complaint demands judgment against the defendant for the par value of his stock, \$1,000, with interest at 6 per cent from June 13, 1916, the date of the assessment, less a small dividend allowed him. And such is the judgment.

On the trial of the action the plaintiff put in evidence the application for an assessment and the allowance of fees to the receiver and attorney and claims against the bank. To this counsel for defendant objected because defendant was no party to the receivership proceeding and was in no way bound by it. No other evidence was offered, only copy of a letter from the plaintiff's attorney to Johnson, and another letter to Hosick from the attorney. The letters are quite immaterial. The complaint in this action, the evidence, the findings of the court, and the judgment, are all based upon a false assumption that defendant is bound by the suit to which he was not a party,—the suit by the attorney general against the bank. In an action against the bank on any claim for which a stockholder is liable, he may be made a party,

and then he is bound by the proceedings. Comp. Laws, §§ 7995-8000. If a stockholder is not made a party, of course he is a stranger to the proceeding and he is not bound by it. It were very strange indeed if the court might go on and bind a person not a party to an action by the allowance of \$5,500 for receivership and attorney fees.

In judicial proceedings the law of the land requires a hearing before condemnation. "That a man is entitled to some notice before he can be deprived of his property is an axiom of law to which no citation of authorities would give additional weight." *Roller v. Holly*, 176 U. S. 398-409, 44 L. ed. 520-524, 20 Sup. Ct. Rep. 410; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The statute, § 5168, merely declares that each stockholder of a bank shall be liable equally and ratably for the debts of his bank to the par value of his stock and *that such liability shall continue for one year after the transfer of the stock*. Hence, an action to recover such liability must be commenced during its continuance and not after the lapse of one year. This action was not commenced until after the lapse of two years and nine months and the liability had then ceased to exist. Hence, the action should be dismissed.

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CHAFFEE BROTHERS COMPANY, a Corporation, Plaintiff, v.  
POWERS ELEVATOR COMPANY, a Corporation, Defendant.

(170 N. W. 315.)

**Trial court—rulings of—assent to by affected party—prejudice—ordinarily estopped to claim.**

1. Where a party invites, and in effect consents to, a ruling, he is ordinarily estopped from asserting that the ruling was prejudicial.

**New trial—order denying—entered subsequent to judgment—appeal from judgment—cannot be reviewed on.**

2. An order denying a new trial entered subsequent to the judgment cannot be reviewed on an appeal from the judgment.

Opinion filed November 30, 1918.

From a judgment of the District Court of Foster County, *Coffey, J.*, plaintiff appeals.

Affirmed.

*T. F. McCue*, for appellant.

Where, between a landlord and tenant, the written lease provides that title to grain raised by tenant shall remain in the landlord till a division and settlement, a mortgage on the grain by the tenant does not attach to any of the grain until after such division and settlement, where such lease is properly filed or recorded. *Angell v. Egger*, 6 N. D. 391; *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355.

*S. E. Ellsworth*, for respondent.

Where parties consent to try a case upon a certain theory of what the law is at the time, though it be erroneous, they cannot complain of the result, if it be true to the theory and the law as adopted at the time. *Davis v. Jacoby*, 54 Minn. 144, 55 N. W. 908.

In all such cases parties and counsel should be compelled to submit to the course which they pursued at the trial, and upon which the trial court acted.

Causes are disposed of in the supreme court in accordance with the law as understood and adopted by all parties and the trial court, at the time of trial and entry of judgment. *Shea v. C. R. I. & P. R. Co.* 66 Minn. 102, 68 N. W. 608.

At the time of the entry of judgment by the district court, it is on all hands conceded that the unwritten law of the case was as set forth in the existing decisions of this court, and parties must be governed by the law in force at the time. *Angell v. Egger*, 6 N. D. 371; *Ins. Co. v. Rutherford (Va.)* 35 S. E. 719; *Merlo v. Coe*, 258 Ill. 328.

In this case the real question was as to the priority of certain claimed liens, and not as to whether plaintiff's lien had attached, and therefore the later decision of this court does not apply in point. *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355, 162 N. W. 542.

"An action for conversion of personal property cannot be maintained unless plaintiff was in possession, or held the legal right to immediate possession, at the time of the conversion." *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313.



CHRISTIANSON, J. This action was brought to recover damages for the alleged conversion of a crop of wheat upon which plaintiff claims a lien by virtue of a chattel mortgage given to him by one Klemstein. The defendant, in its answer, denied all the averments of the complaint. The case was tried to a jury. At the close of the entire testimony, defendant moved for a directed verdict. The plaintiff's attorney did not resist the motion, but conceded that the motion ought to be granted, and in effect consented to a direction of verdict in defendant's favor.

The record shows that the following colloquy took place after defendant had moved for a directed verdict:

Mr. Burdy (defendant's attorney): I understand that plaintiff concedes at this time that the defendant is entitled to a directed verdict. At this time the defendant moves the court to direct a verdict in favor of the defendant.

Mr. McCue (plaintiff's attorney): I can't see any other way out of it, Judge.

The Court: The motion is allowed.

Mr. McCue (plaintiff's attorney): I have done all I could and there is nothing there.

The Court: Gentlemen of the jury: Under the record as it now stands the motion for a directed verdict, made by defendant, is allowed. The plaintiff does not resist the motion in any way, but, in order to make the record complete, I will ask this first gentleman to sign the verdict as foreman of the jury. (After the verdict was signed by the foreman and read by the court.) The clerk may file the verdict, so you may be excused.

Judgment was entered pursuant to the verdict on March 9, 1917. On March 28, 1917, the plaintiff gave notice of a motion for a new trial. The motion came on for hearing on April 12, 1917, and after hearing the court denied the same for the avowed reasons that the plaintiff had to all intents and purposes agreed to a directed verdict in favor of defendant. And that in any event the plaintiff had failed to show the amount of wheat sold to the Elevator Company and the price thereof, so that there was no evidence from which the jury could ascertain the amount of the liability of defendant, if any. Notice of entry of the

order denying a new trial was served on plaintiff's counsel on April 16, 1917. No appeal was taken from the order denying a new trial. But on August 3, 1917, plaintiff appealed from the judgment. No mention is made on this appeal of the motion for a new trial, and no error is attempted to be predicated on the denial of such motion. The only error assigned on this appeal is that the court erred in sustaining the defendant's motion for a directed verdict, and in entering judgment in favor of defendant for a dismissal of plaintiff's action.

It seems clear that upon this record the judgment appealed from should be affirmed. The record (which we have quoted) clearly shows that the plaintiff expressly invited, and in effect consented to, the ruling which the court made upon the motion for a directed verdict. The judgment subsequently entered followed as a matter of course. It is axiomatic that "he who consents to an act is not wronged by it," and that "acquiescence in error takes away the right of objecting to it." Comp. Laws 1913, §§ 7249, 7250.

Whether the court should have granted a new trial is not before us. For no appeal has been taken from the order denying a new trial. The remedies afforded by an appeal from a judgment and an appeal from an order denying a new trial are independent remedies. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085. And it is well settled that an order denying a new trial entered subsequent to the judgment cannot be reviewed on an appeal from the judgment. *Paulsen v. Modern Woodmen*, 21 N. D. 235, 130 N. W. 231; *Heald v. Strong*, 24 N. D. 120, 188 N. W. 1114; *Shockman v. Ruthruff*, 28 N. D. 597, 149 N. W. 680. See also 4 C. J. 684.

It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in result.

ROBINSON, J. (dissenting). The plaintiff sued to recover \$320 for the conversion of property on which it held a mortgage lien, and it appeals from a judgment against it on a directed verdict. The complaint avers that in September, 1912, to secure \$320, Klemstein made to it a chattel mortgage on his undivided half interest in crops to be grown during the year 1913 on a certain quarter section of land (S.W.¼ 9-144 41 N. D.—7.

-66); that said mortgage was duly filed in the office of the proper register of deeds and due notice thereof given to defendant. That during the year 1913, the mortgagor raised on said land 840 bushels of wheat which defendant received at its elevator at Melville, North Dakota, and converted to its own use with both constructive and actual notice of plaintiff's mortgage lien amounting to \$320.—The answer is in effect a general denial.

At the trial it appeared that in 1913 the mortgagor farmed the land under a lease from one Cummins whereby the mortgagor was to furnish seed and to farm the land and to receive half of the crops thereon produced; and, until a division of the crops, it was agreed that the title should be in Cummins. The mortgagor produced on the land 840 bushels of wheat and delivered the same to the defendant at its elevator. The quarter section was all sowed to wheat. When the grain was being hauled, Bowers, the agent in charge of the elevator, was notified by the secretary and manager of the plaintiff that it had a first mortgage on the grain; that notice was given on the first trip,—the first load that was hauled. The wheat graded No. 1 Northern and was worth \$1.02 per bushel. All the wheat grown on the land in question was threshed in September, 1913, and delivered from the threshing machine to the defendant. It was all delivered in the name of Cummins. Immediately after the delivery of the wheat, Bowers demanded pay for it.

In December, 1913, the lessee demanded a settlement with Cummins for his share of the wheat. Cummins refused it and claimed the right to hold back \$2 an acre to secure the plowing, and when the plowing was done he held back the money to abide the event of this suit.

Bowers testified that in September, 1913, he was in the employ of the defendant, and that he received and took in the grain at the request of Cummins, and gave him storage tickets for it in the name of the elevator company; that the grain was not kept in separate bins and it was all shipped out; that the storage tickets were returned and cashed checks made to Cummins.

On such proof and facts, the court directed a verdict for the defendant on the ground that, until a division of the grain, the title was in Cummins. The direction was supposed to be in accord with a rule of law as stated in an old and ill-considered decision by this court reported in *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547. Immediately after

the trial, that erroneous decision was squarely overruled (Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543), and counsel moved for a new trial.

The motion was denied mainly on the ground that when the verdict was directed, both counsel and court labored under a misapprehension of the law, and no objection was made to the motion. However, it is entirely clear that an objection would have been of no avail, and counsel did not in any way mislead the court. The mistake was common to both the court and counsel, and hence the error must be corrected. Indeed, in such a case, according to just, professional ethics, counsel for defendant should not have opposed the motion. The defendant has deliberately chosen to stand in the place of Cummins. It was wholly needless for it to assume the cost and risk of defending the action.

When the summons and complaint was served on defendant, its proper course was to turn them over to its vendor, Cummins, with written notice to appear in the action and to defend his title to the grain or to pay for it with all expenses of the suit. On a proper notice, the vendor of property is always bound to defend his title. Of course, when a vendor is not responsible, the purchaser must beware and he must take his own chances. The courts are bound to know the law and to administer justice in such a way as to rob no man of his property, and to correct their own errors. As it appears from the record, there was no defense to this action. That is too clear for argument.

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E. B. GOSS, Respondent, v. BEN LINDBERG, Appellant.

(189 N. W. 585.)

**Summons** — district court — defendant appearing in response to — suit to enjoin him from trespassing on lands — issues fully tried — form of action — no objection made to in district court — action involving right of possession of land — question of — cannot be raised for first time on appeal — trial by jury — waiver of right to.

1. Where a defendant appears before a district judge in response to a summons and tries the issues involved in a suit to enjoin him from trespassing upon the land of the plaintiff, and cutting, harvesting, threshing or marketing

crops growing thereon, and makes no objection to the form of the action or the method of trial, he cannot, upon appeal, contend that the action, so far as it involves a right of possession of land, should have been tried to a jury.

**Trial court — findings of — supported by evidence.**

2. The evidence as examined and held to support the findings of the trial court to the effect that the plaintiff is entitled to uninterrupted possession of his land and to the crops growing thereon.

Opinion filed September 25, 1918. Rehearing denied November 30, 1918.

Appeal from the District Court of Ward County, *K. E. Leighton, J.* Affirmed.

*Greenleaf, Woledge, & Lusk*, and *Ben Combs*, for appellant.

Possession of real property cannot be taken from one and given to another in an injunction action. *Martinson v. Marzolf*, 14 N. D. 301.

One who holds real estate under an unlawful entry and even without color of title cannot be removed therefrom, and the right of possession determined, in an injunctive action, though such person be insolvent. *Warlier v. Williams* (Neb.) 73 N. W. 539; *Pom. Eq. Jur.* §§ 221, 275, 1346, 1347 and 1357; 22 Cyc. 828.

*McGee & Goss*, for respondent.

Appellant was never at any time covered by the issues here, the tenant of respondent. There was never any lease agreement between the parties covering the land in question, and appellant was merely the servant of the respondent, so long as his services proved satisfactory. 7 Words & Phrases, 6329; *Gray v. Rt. Co.* 11 Hun, 70, 741; *Silsby v. Town*, 24 Fed. 893-894; *Hart v. Hart*, 22 Barb. 606-610; *Brown v. Foster*, 113 Mass. 138, 18 Am. Rep. 463; *Gibson v. Granage*, 39 Mich. 49, 33 Am. Rep. 351; *Barrett v. Raleigh Coal Co.* 51 W. Va. 416, 41 S. E. 220.

"A contract of employment providing that the work performed would be to the satisfaction of the employer means that the employer is to be the judge,—that the question of the reasonableness of his judgment is not open to contention, and does not mean that the employee will be entitled to recover if he was a competent workman." *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Plano Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841; *Taylor v. Williams*, 45 Mo. 80-81; *Harford v. Brush*, 48 Vt. 528; *McCarran v. McNulty*, 73 Mass. 139; *Union League Club*

v. Blymyer, 204 Ill. 117, 68 N. E. 409; Wood County v. Smith, 50 Mich. 565, 15 N. W. 906, notes in 17 L.R.A. 210 and 65 L.R.A. 783; Holingsworth v. Colthorst, 78 Kan. 455, 17 L.R.A.(N.S.) 741; Thaler v. Wilhelm Co. (Pa.) 33 L.R.A.(N.S.) 345, 6 R.C.L. 952-953, §§ 333 and 334.

Without a lease appellant had no right upon respondent's premises for any purpose. He was insolvent and was threatening to take the respondent's crops. Proof of his insolvency establishes respondent's right to equitable relief by injunction, as no other relief at law would be adequate as against the threatened irreparable injury. 14 R.C.L. 346, § 48; note in 17 L.R.A. 210; 65 L.R.A.783; Holingsworth v. Colthorst, 78 Kan. 455, 18 L.R.A.(N.S.) 741; Thaler v. Wilhelm Co. (Pa.) 33 L.R.A.(N.S.) 345; 6 R.C.L. 952, 953, §§ 333 and 334.

With our title conceded; with our possession undisputed; with appellant's own testimony making a finding that the law be followed impossible, and under the showing of irreparable injury and the insolvency of the appellant, the injunctional judgment should be affirmed. Zimmerman v. McCurdy, 15 N. D. 79; Martinson v. Marzolf, 14 N. D. 301.

The injunctional judgment was superseded and stayed as to execution in violation of law. Notes in 1 L.R.A.(N.S.) 554; 16 L.R.A.(N.S.) 1063; and 38 L.R.A.(N.S.) 436; 3 C. J. 1281 et seq.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Ward county, awarding a permanent injunction to the plaintiff and respondent, which enjoins the defendant and appellant from trespassing upon the land of the plaintiff and cutting and harvesting, threshing, or marketing the crops growing thereon. The controversy arose out of a misunderstanding between the parties as to their relationship following the execution of a contract entered into in 1917. The plaintiff, E. B. Goss, being the owner of three quarter sections of land, entered into a contract with the defendant, Ben Lindberg, in the month of February, 1917, whereby Lindberg agreed to break and sow to flax 400 acres or more of the plaintiff's land at \$5.50 per acre. In the contract options were given as follows:

"It is further understood that Lindberg will have first chance at cutting and harvesting, threshing, and hauling and marketing said flax

providing he will perform the same immediately when Goss is ready to have it done and as cheaply as others will do it.

"It is further understood and agreed that if Goss is satisfied with the way said breaking and seeding and other work is done, Lindberg shall have the first chance at renting said land so broken for the cropping season of 1918 upon the following terms, to wit:

"Goss to furnish seed. Lindberg to double-disk said land in the fall, if possible, and seed the same to wheat in the spring of 1918. Goss to furnish one-half twine and one-half thresh bill and take one-half of the crop. Lindberg to deliver in the elevator without charge Goss's one half of the crop for 1918."

More than 400 acres of the land were broken and sown to flax in 1917, but, owing to drouth, the seed failed to sprout and there was consequently no crop. Lindberg was paid for the work he did under the contract in 1917. During the winter there was some talk between the parties relative to the farming of the land the following season. Both parties agree that in these conversations, occurring during December, January, and February, the plaintiff proposed to the defendant that he put in the crop for hire. Goss testified that the defendant actually proposed to seed the land for \$2 per acre, but that he did not at the time accept his proposition because he considered the price too high. Lindberg, on the other hand, testified that he told Goss that he would not crop in for hire, but that he would hold him to the contract. It is clear from the testimony of both parties that a definite agreement for putting in the crop for hire was not reached during the negotiations in the winter.

In the spring of 1918, Goss shipped seed wheat to Lindberg, giving certain directions with reference to hauling and cleaning the same. On April 20th, Goss went out to ascertain what was being done towards putting in the crop, and, upon inspection, learned that a portion of the land had been disked and that Lindberg was making preparations to continue the seeding operations. The season of 1918 being early, it seems that Goss felt that the seeding operations should have been further advanced on April 20th than he found them to be; and, during a conversation with Lindberg on the above date, he, Goss, suggested that he would have one Thompson, a tenant upon another of his farms, seed a portion of the land amounting to about 140 acres. Lindberg did not

take kindly to this suggestion and the parties separated without a definite understanding. Goss, however, immediately afterward wrote Lindberg to the effect that he had decided to let Thompson put in the 140 acres, giving as his reasons therefor the lateness of the season, and that he had had to buy \$400 worth of feed for Thompson, so that Thompson was already paid for the work. To use his own language, he said: "I cannot afford to pay him in that way and you, too; or in other words, pay you for it and loan him the money for the whole season, hard as times are, too. So will let him work out part of what he owes me that way." After the letter was written, the defendant seeded all of the land except that portion which was turned over to Thompson by Goss. In the month of July, Goss wrote the defendant to the effect that he had been up to see his crop and had intended seeing the defendant about giving him the first chance at cutting that portion which had been seeded by him. He also stated that he would probably be up again during the week, at which time he would want to know what the defendant would want for cutting the crop. In reply to this letter, Lindberg wrote as follows:

"I have your letter of the 22d inst., and cannot understand why you should be looking for anyone to cut the crop on the Hanna land. I put in this land according to our contract and will see to the cutting of it when it is ready and deliver your half to the elevator when it is threshed."

As a consequence of the disagreement as to the ownership of the crop, this action was brought, and it is in this court for a trial *de novo*.

In addition to the usual specification demanding a review of the entire case, the appellant specifies that the complaint does not state a cause of action, it appearing on its face that the plaintiff has an adequate remedy at law. Whatever merit there may be in the appellant's contention, that the case is one that should have been tried to a jury, we are satisfied that he is in no position to predicate error upon the failure of the trial court to submit the case to a jury. The action is one for injunction, and the counsel for the defendant could not have been misled as to the character of the proceedings from their very inception; yet, according to the record, it was at no time suggested that the trial should not proceed before the court as an ordinary trial of a suit in equity. No objection was made to the form of the action, the suffi-



ciency of the complaint, or the method of trial, by either a motion or a demurrer, and the entire controversy was tried before the court on its merits. Under these circumstances, the appellant is in no position to argue that, inasmuch as the case involves a right of possession between plaintiff and defendant, it should have been tried at law as a civil action in forcible entry and detainer.

Upon its merits the case involves questions of fact upon which the testimony is conflicting. There were but two witnesses sworn upon the trial, the plaintiff and the defendant. The plaintiff testified to the effect that it was well understood between him and the defendant that he had bought the half section under a crop-payment contract which rendered it necessary that he should get the first crop, and that, owing to the failure of the flax crop in 1917, he was compelled to hire his seeding done in 1918 so that he might realize upon that crop in order to make good his crop payment to the vendor. He testifies that he told Lindberg in the fall and winter of 1918 that for the above reasons he would not rent the land either to him or anyone else. Lindberg, on the other hand, testifies that when Goss suggested hiring the seeding done he insisted that he would farm the land under the 1917 contract, and that Goss assented to his doing so. The testimony is at variance throughout touching the actual arrangements made, and the version of each party as to their conversations and transactions is consistent with his contention here. It appears, however, from the letter Goss wrote to the defendant, after his visit to the farm in the spring before any seeding had been done but after a little preparatory work by Lindberg, that Goss clearly intended to pay a reasonable price for the seeding of the crop. The portion of the letter quoted above clearly indicates that such was his intention. Following this letter, we find him yielding to Goss's direction, and allowing approximately 140 acres of the land embraced in the contract of the previous year to be seeded by Thompson for hire.

Under the record presented, the testimony of the two witnesses conflicts in every vital point, and the proper solution of this case requires that the findings shall be in accordance with the version of either one party or the other. We are of the opinion that the circumstances disclosed by the record tend to support the version of the plaintiff rather than that of the defendant, and the trial judge, who had the benefit of

the appearance of the witnesses before him, having found in favor of the plaintiff, we do not feel justified in disturbing the findings. The judgment of the trial court is therefore in all things affirmed.

GRACE, J. I dissent.

ROBINSON, J. (dissenting). This action presents a peculiar phenomena. It was commenced in August, 1918, and in less than a month it found its way to this court. The plaintiff is a shrewd lawyer,—a man of means and influence; he has been a district and a supreme court judge. The defendant is a man unlearned and poor, and, strange as it may seem, his poverty is made the corner stone and the basis of this action. Though this is not a replevin suit or an ejectment suit, it is brought to settle a dispute concerning the possession of real and personal property.

The plaintiff avers that he owns certain land and the crop thereon, and that defendant claims to own a half interest in the crop and intends to harvest and thresh the same; that he is insolvent and the head of a family. Wherefore the plaintiff has no adequate remedy at law, and he demands that defendant be enjoined from withholding the possession of the property and from harvesting and threshing it. The defendant appeals from a judgment against him. By answer defendant claims title and possession under a contract with the plaintiff whereby he, the defendant, was to crop the land, to harvest the crop for a half interest in the same.

Defendant claims: (1) That plaintiff had an adequate remedy at law, and that a party may not use an injunctive suit to recover the possession of real or personal property, even though the defendant be poor; (2) that plaintiff did not prove his right to the possession of the property.

On the first point Justice Birdzell seems wholly to misapprehend the position of defendant's counsel. It is that the complaint does not state a cause of action,—that a party may not use an injunctive suit to recover possession of land or chattels. Of course, no one is so daffy as to contend that he is entitled to a trial by jury in a proper injunctive suit, but this is not such a suit. By statute, an issue of fact in

an action to recover money only, or specific real or personal property, must be tried by jury unless a jury is waived. § 7608.

The constitutional right of trial by jury would be of little avail if it might be evaded by an injunctional suit to recover or defend money or specific real or personal property. This court and many other courts have held that a party may not recover either real or personal property by an injunctional suit, and that is the law. *Martinson v. Marzolf*, 14 N. D. 301, 307, 103 N. W. 937; *Warlier v. Williams*, 53 Neb. 143, 73 N. W. 539; 28 Cyc. 228, and one hundred decisions there cited.

Point 2: But on the real merits of the case, what are the facts and probabilities and the weight of evidence? It is a fact that Lindberg has sown and harvested the crop, and he must have done it at a great expense. He was to receive in pay the reasonable value of his work and expense or a half interest in the crop. In regard to the compensation, the testimony of Goss and Lindberg is in direct conflict and the one does fairly cancel the other. Hence, the cause should be determined by the conceded facts and the probabilities. It is certain that in 1917, under a written contract with the plaintiff, the defendant broke the land, seeded it to flax, and in consideration of doing the work at a reduced price, it was agreed that, if Goss was satisfied with the breaking and seeding, Lindberg should have the first chance at the renting of the land for the cropping season of 1918 on the following terms:

Goss to furnish seed, Lindberg to double-disk the land in the fall if possible; Goss to furnish one-half twine and one-half thresh bill and to take one half of the crop, the other one half to go to Lindberg as his share of the 1918 crop; Lindberg to deliver in the elevator without charge Goss's one half of the crop for 1918.

Now it is certain that in 1917 Lindberg did a good job and did it with the inducement of a half interest in the 1918 crop. Relying on that option, Lindberg went upon the land in the spring of 1918, disked it and cropped it, Goss furnishing him the seed. And it is certain the cropping was done *without any express agreement to do it for hire, and there is no claim that Goss ever paid or offered to pay for the disking and seeding, or that defendant ever asked for pay*. Indeed, that point was raised by a judge of this court when Goss first applied for an order to show cause, and Goss then claimed that he had made two payments, —one \$75 and one \$70. But now it appears from the evidence that the

\$75 was on a debt of \$118, and the \$70 was on an order to Rogers Lumber Company. And when Goss settled for the work done in 1917, he deducted the amount of the order. (82). He deducted \$132 of which \$70 was for the order.

As Goss insists, the defendant was poor and in need of money. He was hard up and "busted." (90). Yet, he never asked Goss to pay him for putting in the crop and Goss never offered to pay him. According to his own testimony, he allowed this poor defendant to act as his banker to finance his cropping, and he never disputed Lindberg's right to the land under the lease until a good crop was fully assured and until he had gone and passed three hours in looking over the crop. Then, on July 22, 1918, he wrote Lindberg that he was amazed to learn that he, Lindberg, should claim an interest in the crop. And Lindberg expressed an equal amazement that Goss should question his interest.

Now the plaintiff is a shrewd lawyer and a man of affairs. He knew well how to make a definite contract; he knew that if he hired a poor man to do work by the acre, he should pay for the work as it was done. And it was not for him to put himself in a dubious position, and to await the maturing of the crop before electing to pay in cash or by a share of the crop. Under the facts presented, if the matured crop had been destroyed by hail and if Lindberg had then brought a suit to recover the reasonable value of the work and expenses, Goss might have successfully defended by showing the optional lease and the fact that Lindberg, though poor and needy, had never asked for pay while there was a prospect of a crop. Goss knew that when a person puts in a crop for money hire, he wants his pay when the work is done. He does not wait until after harvest and take a chance of getting his pay at the end of a lawsuit. No one ever heard or knew of a poor man doing business like that.

Now this is really the main point in the case. It was for some reason ignored by Goss, though his attention was repeatedly directed to it by a judge of this court, and though it was insisted on by counsel for the defendant it was also ignored by the trial judge, and for that reason his decision is of no weight.

By comparison the other points are all trivial. It is true that on April 20th, in passing Lindberg on the road, Goss spoke to him about letting one Archie crop 120 acres of the land. Lindberg had then

disked 120 acres and he flared up and said to Goss, "To hell with you and Archie." The next day to mollify Lindberg, and to induce him to let Archie crop 120 acres, Goss wrote him quite a nice smooth letter. He says: "My principal reason is that I had to buy \$400 worth of feed for Archie and so he is paid for it. Now I do not feel that I can afford to pay him in that way and you too. Or, in other words, to pay you for it and to loan him the money for the whole season hard as the times are too." This pay talk was put in the middle of the letter, and there is no showing that Lindberg gave it any attention. And it was no way of saying that Lindberg should receive his pay in money, and not in a share of the crop. And when Archie offered to seed the 120 acres, Lindberg said to him: "You may put it in, but I will harvest the crop."

Truly Goss testifies that he refused to let the place on shares to Lindberg, saying that he had to have all the crop of 1918 to apply on his land contract. And so he put in evidence a contract to pay for the land by turning over a part of the crop. As the contract shows, he was to pay on the land \$4,500 November 1, 1917, and \$5,000 November 1, 1922, and the crop on the land was security for the same. Of course, that contract was not material, and the ex-judge should have known better than to put it in evidence. He knew from the experience in 1917 that a crop may prove a failure. He knew it cost money to pay help, to buy teams, feed, farm machinery, and to disk, seed, harrow land, and to harvest and thresh a crop. The usual pay for such work is precisely the same as stated in the optional lease, and for such work most men prefer to pay half the crop rather than to pay for it in cash and take the chance of having no crop. One year with another, the risk and expense of producing a crop is equal to half its value.

Finally, the burden of proof is on the plaintiff, and all his testimony is fairly met and canceled by the testimony of Lindberg. It is a case wherein the actions of the parties speak louder than words, and fairly show that the cropping was done under the optional lease, and, with all his poverty, Lindberg financed the deal and took the risk of getting a crop. And the poverty of Lindberg is no legal cause of dispossessing him by an injunctional suit. The complaint does not state a cause of action. Hence, the action should be dismissed.

## ABRAHAM WOLF, Respondent, v. MATLE WOLF, Appellant.

(169 N. W. 577.)

**Divorce — action for — ground — extreme cruelty — evidence — desertion by plaintiff.**

The plaintiff brings this action for a divorce on the ground of extreme cruelty, but the evidence shows that defendant has been too submissive and the plaintiff has been guilty of wilful desertion and wilful neglect. Judgment reversed and action dismissed.

Opinion filed November 1, 1918. Rehearing denied November 30, 1918.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton*, Judge.

Defendant appeals.

Reversed and action dismissed.

*E. T. Burke* and *J. E. Burke*, for appellant.

Extreme cruelty consists of the infliction by one party to the marriage, "of grievous bodily injury or grievous mental suffering upon the other." Comp. Laws 1913, § 4382; 9 N. D. 188; 7 N. D. 324; and 12 N. D. 17; 9 R. C. L. 333.

Condoned offenses should not be considered even in connection with new grounds for divorce. 9 R. C. L. 380; *Christianberry v. Christianberry*, Blackf. (Ind.) 202, 25 Am. Dec. 96.

It is also true that voluntary marital cohabitation by the wife with her husband after acts of cruelty on his part which would have entitled her to a divorce will constitute condonation. 32 L.R.A.(N.S.) 837; Ann. Cas. 1912C, 10, 15.

*Greenleaf, Wooledge, & Lesk*, for respondent.

The claims of condonation, as that is defined by and understood in law, are in no manner sustained. Comp. Laws 1913, §§ 4390-4392.

ROBINSON, J. In this suit defendant appeals from a judgment awarding the plaintiff a divorce on the ground of extreme cruelty. The finding of the trial court is merely that "the defendant's conduct toward the plaintiff amounts in law to extreme cruelty."

The age of the plaintiff is forty-five years; the age of the defendant,

fifty years; they have one daughter, Minnie, whose age is twenty-five years. They are Russian Jews of the old school, and for some ten or more years he has been acting as a rabbi and Jewish teacher. Twenty-seven years ago after a short acquaintance, the parties were married in Russia. She was a thrifty dressmaker, and prior to the marriage and for years afterwards she supported her young husband. Soon after the marriage her brother paid their fare to New York city, where she worked at dressmaking and supported the family for years. There they lived for seventeen years and most of that time she supported the family. A part of the time he was learning to be a rabbi and working with her brother in the fur business. Then for a short time they kept a little eat shop, which he sold and ran off, leaving her under arrest for retaining possession of the shop.

During the first five years in New York he did nothing to support his family, and when he left the city he left her no means, and she did not hear from him for a year. After he had been gone a year she heard from him in Fargo, North Dakota; then he sent her \$100 to come to Fargo and she came with her daughter. Soon they left Fargo and went to Chicago, where they remained a few weeks and went to Washington, D. C. Then he went back to Fargo, then to Chicago, and wrote defendant for money to take him back to Washington. In Chicago he worked in a basement, killing chickens. The good wife took pity on him, and borrowed money from her brother and sent it to him, so he returned to Washington and remained there some three years. Then without notice he left his wife, and she did not hear from him for six months. Then for a year and a half they lived at Aurora, Illinois. Then he went to Chicago, got a contract as a rabbi. He wanted to live in a big town. Then after a time he got leave of absence; got four weeks' pay to go on a vacation, and left his wife with \$10 and a month's rent. Then he went off to Fargo and Minot to get the divorce and commenced this action on the first day after his year of residence. On the testimony it is entirely clear that he has been guilty of wilful neglect, wilful desertion, and wilful failure to support his family.

The defendant has been a long suffering, patient, and much abused wife. Indeed, she has been a regular goosey. By undue submission, by want of proper spirit, by failure to assert her rights as a woman

and a wife, and to resent the wrongful conduct of her husband, she has done a great wrong to him and to herself and to her daughter. And perhaps for that reason and that alone, he should have a divorce. However, it is not one of the causes provided by statute.

Judgment reversed and action dismissed.

BRUCE, Ch. J. I concur in the judgment and law announced by Mr. Justice ROBINSON, though not perhaps in his homilia.

GRACE, J. I concur in the result.

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J. W. LAHART, Appellant, v. MINNESOTA GRAIN COMPANY, a Corporation, Respondent.

(170 N. W. 328.)

**Accounting — action for — evidence — judgment.**

In an action for accounting, evidence examined and *held* to sustain the judgment.

Opinion filed April 13, 1918. Rehearing denied November 30, 1918.

From a judgment of the District Court of Foster County, *Coffey, J.*, plaintiff appeals.

Affirmed.

*Maddux & Rinker* and *George H. Stillman*, for appellant.

"Where it is apparent from the pleadings that a record or instrument will be necessary on the trial, as the best evidence, no previous demand is necessary." *Owens v. Bemus*, 22 N. D. 158, with point squarely stated on page 168.

Books and accounts made up from other and original records by bookkeepers are not the best evidence, and it is error to admit them over objection, and especially where demand is made for the original entries and accounts, and their production is refused. *Kayo v. Taylor*, 28 N. D. 293; *Sykes v. Beck*, 12 N. D. 242.

A litigant, having in his possession the primary or original record,



cannot establish his contention by parol evidence or unauthenticated copies or posted records. *Hurley v. St. Paul*, 86 N. W. 427; *Sykes v. Beck*, supra; *Monton v. Ry.* 128 Ala. 537; *Mason v. Bull*, 26 Ark. 164; *Adams v. Trustees*, 37 Fla. 266; *Chicago v. McGraw*, 75 Ill. 566; *Mandel v. Land Co.* 154 Ill. 177; *Downing v. Haston*, 21 Kan. 178; *Bank v. Bowen*, 19 Ky. L. Rep. 1416; *Avery v. Butters*, 11 Me. 404; *Reppy v. County*, 47 Mo. 66; *Vale v. School Dist.* 75 N. W. 855.

It is only where the best evidence is out of control of the party and he is unable to produce it, that substitute or secondary evidence is admissible. *Company v. Cannon*, 31 Fed. 313; *Bogan v. McCutcheon*, 48 Ala. 393.

*James R. Manly* and *Alvord C. Egelston*, for respondent.

"Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge." Comp. Laws 1913, § 6771; 31 Cyc. 787.

The rights and obligations of the parties to a pledge may be modified indefinitely by special contract between them. *Jones, Collateral Securities—Pledges*, § 14.

In this, as in all other cases of contracts, the courts will endeavor to ascertain the intention of the parties, and give effect thereto. 31 Cyc. 788; *Dungan v. Mutual etc. Ins. Co.* 38 Md. 242; *Jones, Collateral Securities, Pledges*, note to § 9; *Palmer v. Mutual L. Ins. Co.* 114 Minn. 1.

Entries in partnership books are admissible as between partners, and are also competent in favor of third persons in actions against the partners, in the nature of admissions of the facts stated. 2 Enc. Ev. 667.

CHRISTIANSON, J. This is an action for an accounting. Plaintiff was engaged in the elevator business. He owned and operated two elevators individually; and the Gribbin-Alair Grain Company, a co-partnership in which plaintiff had a one-third interest, owned and operated seven other elevators. Both plaintiff and the copartnership were indebted to the defendant for moneys borrowed from it. The plaintiff individually owed the defendant something over \$30,000. On June 7, 1907, for the purpose of securing the payment of \$10,000

of such indebtedness, the plaintiff executed and delivered to the defendant the following written instrument:

I, J. W. Lahart, for and in consideration of the sum of ten thousand (\$10,000) dollars in hand to me paid by the Minnesota Grain Company of Minneapolis, Minnesota, do hereby sell, assign, and transfer to the Minnesota Grain Company all my interest and share in the elevators now operated and owned in North Dakota by the Gribbin-Alair Grain Company, my interest being the one-third interest, the said elevators being situated in the following towns in North Dakota, to wit: New Rockford, Sykeston, Hurdsfield, Heaton, Bowdon, Denhoff and Jud.

That the Gribbin-Alair Grain Company is incorporated under the laws of the state of North Dakota, and owner of the elevators in the above-described towns, and is incorporated for the sum of \$60,000, and I am the owner of one-third interest in the incorporation, but that the stock has never been issued to me, and I hereby authorize the Gribbin-Alair Grain Company to issue the stock which should be issued to me in the due course of business, and at the time they should be issued, to the Minnesota Grain Company or its assigns.

Dated this 7th day of June, 1907.

J. W. Lahart.

Signed in the presence of R. F. Rinker, Olive Couch.

He also turned over to the defendant the two elevators owned by plaintiff individually, for which it was agreed he was to receive a consideration of \$13,650. The balance of such individual indebtedness, plaintiff paid.

This controversy arises over the elevators mentioned in the written agreement above set forth. The Gribbin-Alair Grain Company was originally a copartnership consisting of the plaintiff, Thos. Gribbin, and E. E. Alair, each of whom owned a one-third interest in the partnership. Later they determined to incorporate the firm, each member to receive an equal amount of corporate stock. It appears that prior to the execution of such agreement the Gribbin-Alair Grain Company had been duly incorporated under the laws of this state, but no capital stock had been issued. After the execution and delivery

of the assignment to the defendant, the respective stockholders met and perfected a corporate organization, issued stock, and elected officers. The Gribbin-Alair Grain Company owed a considerable amount to the defendant. It also was indebted to P. B. Mann Company, which indebtedness was taken over by the defendant.

The Gribbin-Alair Grain Company continued in business for some time. But eventually it disposed of all its elevators, and converted its assets into cash. No complaint is made with respect to the sale of the assets of the company, but plaintiff asks for an accounting of the moneys realized from such sale and from the operation of such elevators while retained by the Gribbin-Alair Grain Company, including proceeds from the sale of grain on hand at the time plaintiff assigned his interest to the defendant.

It is undisputed that plaintiff owned a one-third interest in the Gribbin-Alair Grain Company, and that this interest was assigned to the defendant to secure a \$10,000 debt which plaintiff owed to the defendant. Hence, it is conceded that the defendant is entitled to retain \$10,000 and legal interest thereon out of plaintiff's distributive share of the assets of the Gribbin-Alair Grain Company. But plaintiff contends that defendant has received not only sufficient to discharge such indebtedness, but a sum considerably in excess thereof.

At the close of the trial, the trial court summarized the facts as follows: "On or about June 7, 1907, Mr. Lahart was personally indebted to the Minnesota Grain Company, in the sum of something over \$30,000. Two elevators in Warwick and McVile not owned by the partnership of Gribbin-Alair Grain Company were turned into the Minnesota Grain Company, at an agreed price of about \$13,650. At the same time there was cash paid, at one time of about \$750, proceeds of grain from the elevators at McVile and Warwick, and another check of about \$4,000 from the same source, or from some cash of Tom Lahart personally. In addition to that, Mr. Lahart assigned or authorized to be issued stock in the Gribbin-Alair Grain Company to the extent of \$10,000. That stock was issued and came into the possession of the Minnesota Grain Company and defendant. It seems to be clear and conceded that these payments wiped out and canceled and discharged the personal indebtedness of J. W. Lahart, the plaintiff, to the Minnesota Grain Company. That is shown and

seems to be conceded in the evidence taken here about a year ago. At about the same time, June 7, 1907, Gribbin-Alair Company paid the P. B. Mann Company about \$6,000. To discharge that indebtedness, the Gribbin-Alair Company authorized the closing out of the grain which was owned by them, the turning over to the Minnesota Grain Company of the proceeds of the grain in the elevator, and the value of the buildings, the elevator buildings at seven different points, stated in exhibit C. And it was understood that the business should be closed out conveniently, and it seems that it was closed out on or before January 1, 1908. So far as the evidence in this case discloses, there was at that time, January 1, 1908, owned in the way of equities \$36,548.68, and that amount is disclosed after the Minnesota Grain Company had applied the value of the elevators and the grain in elevators upon the indebtedness of Gribbin-Alair Grain Company, to the P. B. Mann Company and to the Minnesota Grain Company. At this time it appearing that the Minnesota Grain Company had taken over the indebtedness of the Gribbin-Alair Company to the P. B. Mann Company and held it against the Gribbin-Alair Company, all of which seems to have been agreed to and the books were closed, and the business has proceeded upon that theory. Now, here is \$36,548.68. If Mr. Lahart has assigned his stock of \$10,000 to the Minnesota Grain Company absolutely without any condition, then Mr. Lahart has no interest whatsoever in that amount at this time, because the Minnesota Grain Company has purchased upon that theory his interest in the Gribbin-Alair Company stock, and had secured the stock and were in the possession of the same. Upon the theory, however, which I have followed and adopted in this case, that this stock was assigned to the Minnesota Grain Company, as security only, then Mr. Lahart would be entitled to receive in this action one-third interest in \$36,548.68, which amount would be \$12,182.89, which would be his after he had paid the indebtedness of \$10,000, with interest on the amount. But in this case, looking at it from the most favorable standpoint for Mr. Lahart, and considering that the assignment of his stock was made as security, the record shows about as follows: That he owes the Minnesota Grain Company \$10,000, and that he owes them the further sum of over \$3,000 on a book account, making the sum of several hundred dollars at least in excess of \$12,182.-

89, and in this action he is clearly not entitled to recover anything. The defendant in this case has not asked for any affirmative relief against Mr. Lahart's account, and of course will be awarded none. But under this state of facts Mr. Lahart is not entitled to recover anything."

After a careful examination and consideration of the evidence we find that the material facts summarized are established by the evidence. In fact the ultimate deductions drawn by the trial court are the only ones which could have been drawn by any reasonable, fair-minded man. The judgment appealed from is clearly right and must be affirmed. It is so ordered.

GRACE, J. (dissenting). I am unable to agree with the conclusion reached by my associates in this case. Being the only one of the judges who dissents, I feel it is not necessary to go greatly into detail. I feel fully convinced that the accounting is neither complete nor correct. The defendant undertakes to defend upon two main grounds: First, that the plaintiff had \$10,000 in stock in the Gribbin-Alair Grain Company which was turned over in settlement of his debt with the Minnesota Grain Company. Then there is another theory the defendant relies upon, that the stock of the plaintiff was turned over as security, and that all the property, such as the elevators, grain, etc., had been sold and the proceeds fully accounted for to the plaintiff. The defendant's case veers back and forth between these two defenses. It seems to rely part of the time upon the \$10,000 stock transfer as being absolute, and then again it abandons that idea and concedes taking the property as security, and claims it had fully accounted to the plaintiff for all such property of the plaintiff, which was turned over to the defendant, or which came into its possession.

Books of account, when well kept, and when demanded willingly produced in evidence, when such books contain the original entries, and proper proof is made thereof, and such books properly offered in evidence, are entitled to some weight and credit. It is shown by competent testimony in this regard that Mr. Brice, an attorney of Minneapolis, acting for Mr. Lahart, sought to examine the books in connection with this accounting.

Mr. Lahart and Mr. Brice went up to Gunderson's office, and Mr. Lahart testifies positively that he heard Mr. Gunderson order him out of the office.

Q. Did you hear Mr. Gunderson order him out of the office?

A. Yes, sir. Heard him tell him that he had no business looking at what he did. He wanted to look at some letters—wanted this letter. Wished to get some papers, and Mr. Gunderson told him to get out of the office and stay out.

It appears from the testimony that the letter referred to was finally brought forth, and it also appears that Brice made some examination of the books, either by himself or through some accountant. Other testimony with regard to the books, and very pertinent, is as follows:

Q. You heard the statement of counsel that the books were always open to inspection, did you not?

A. Yes, sir.

Q. You may state what was done about examining the books, whether you examined them.

A. Must be I went down there a dozen times to call on Mr. Gunderson at his office. He would never let me see the books. Never let me go through them.

Q. How long did you stay out any of the times you were down there?

A. Two weeks sometimes.

Q. Did you ever get access to any of these books?

A. No, sir.

Q. Did you ever get access to the books?

A. No, sir.

Q. When was that?

A. In 1909, or a year later.

Q. Sometime in 1909?

A. Along in August, 1909.

Q. And about a dozen times, or ten or eleven times besides you were there to see them and never got to view the books?

A. No, sir. Never saw them.

There is nothing in the record to show but that Mr. Lahart is a good straightforward citizen. His integrity and truthfulness is no-

where attacked. In view of such testimony it is idle for the defendant to contend that they have been perfectly willing to throw open their books to the plaintiff, or that they have been willing to enter into an accounting with him and to fully and fairly account to him for all his property received by them. After June 7, 1907, when the plaintiff had ceased to be actually associated with the Gribbin-Alair Company, he had no control over the books, and sometime after that date they were sent down to Minneapolis, and the testimony derived from the books under all the circumstances of this case is not entitled to be considered, the only method by which proof may be had of the matters in dispute or involved between the plaintiff and the defendant. The plaintiff positively testifies that, at the time the elevators were turned over, there was in them grain of the value of \$30,000. The plaintiff and Alair went to these elevators, and Lahart measured the grain and weighed the grain up in one elevator. They went home and Lahart figured it up, Alair being present when the figuring was done and saw the figures, and Lahart said there was \$30,000 worth of grain.

Alair also testified as follows:

Q. Have you investigated, and have you information, and from the information had at that time, can you state how much wheat on your information there was in those elevators in value?

A. I could not state exact at all.

Q. What is your best judgment?

A. I think there ought to have been close to \$30,000 worth of wheat. I can tell if I see the ledger.

We have therefore these two men, each of whose testimony is unimpeached, testifying that there was \$30,000 worth of grain in the elevators at the time they were turned over. After the 7th of June, Lahart was not actually connected with the operation of the elevators, but Alair was. He still continued to remain a part of the Gribbin-Alair Company, and his testimony entirely confirms that of Mr. Lahart. There is no testimony to dispute this.

Thompson, the expert, testifies as follows:

Q. It is absolutely impossible to tell from that record what grain was actually in the warehouse?

A. Unless you follow it up to the end of the season whenever they closed out.

So that it appears that the only way the expert had of telling what grain was in the elevators on June 7th would be to have the business continued from June 7th until the end of the year, and from that make a deduction of what amount of grain was on hand June 7th. We are fully convinced that his testimony with reference to what grain was in the elevators on June 7th falls far short in weight of that of Lahart and Alair. It cannot be disputed that the amount of grain in bin may not be accurately and exactly determined by measurement, but it can be so determined approximately. A farmer may have a bin in his granary of certain dimensions. He may not be able to tell exactly the number of bushels in said bin, but it is safe to assume that if he knows how to measure a bin he may do so, and the result of his calculation will be but a very few bushels from being in accordance with the actual number of bushels in such bin as determined by weighing it. As we view the matter, there was \$30,000 worth of grain in those elevators shown to have been there by competent testimony of two witnesses, and we are candid in saying that we believe there has been no fair or full accounting thereof. In addition to this, Mr. Gunderson shows at one place of his testimony that he received \$15,000 from the Gribbin-Alair Grain Company which he never paid back.

We will set out his testimony in this regard as well as that relating to an additional amount of \$33,339:

Q. Mr. Gunderson, do you know of drawing out from the Gribbin-Alair Grain Company on your own account \$10,000?

A. Yes, sir.

Q. Did you one time draw out the amount of \$5,000?

A. I think so. Yes, sir. I charged it to my account.

Q. I understand. Just answer the question.

A. Yes, sir.

Q. And what was your account with the Gribbin-Alair you charged this to?

A. To my personal account.

Q. Is it shown on that book?



A. Yes, sir. Here. Yes, sir. Just wait half a minute. We will get this thing straight. Yes, sir, it shows here.

Q. Did you ever pay this money back?

A. No, sir.

Q. You did not?

A. No, sir, why should I? The company had gone out of business. The assets belong to me.

Q. This was charged in 1908?

A. Yes, sir.

Q. Then in speaking of the assets of the Gribbin-Alair you do not include that \$15,000 with their assets?

A. Most assuredly.

Q. You have not done so in your evidence, have you?

A. Yes, sir. I figured that as on hand; I figured that cash on hand. Most assuredly do. The assets in detail. That day also assumed the Alair account. I wish you to know Mr. Maddux settled that up.

Q. You also had \$33,339 yourself?

A. Yes, sir.

Q. Now, what is this Gribbin & Alair?

A. Gunderson & Alair.

Q. What is this \$14,632? That really out?

A. Yes, sir.

Q. So, you really owe \$37,937.58?

A. Yes, sir.

Then there is further testimony showing what the Gribbin-Alair Grain Company owed the Minnesota Grain Company, and there is testimony showing that there was a balance of \$34,326.65, and the same was testified to, that that is the way it appears on the books.

Gunderson and the Minnesota Grain Company may be considered as the same interest. Gunderson was treasurer of the Minnesota Grain Company and held some other offices therein. We are fully convinced that there has not been a full accounting. There is no doubt but that Lahart is entitled to a full accounting. He is entitled to an accounting for the value of the grain in the elevators at the time they were turned over, the profits, if any, made upon the elevators thereafter until the sale thereof, and a full accounting as to the sell-

ing price and interest on all such amounts. We feel, in the interest of justice, that a new trial should be granted, and that reference should be had of all the questions in this case, and plenty of time and opportunity had to obtain a full, true, and correct account of all the matters between the plaintiff and the defendant.

### On Petition for Rehearing.

PER CURIAM. Plaintiff has filed what is denominated a "motion for rehearing," and also a supplement to such motion. Especial complaint is made of the trial court's finding, embodied in and approved in our former opinion, to the effect that the plaintiff, in addition to the \$10,000 and interest, also owes a book account of over \$3,000. In the supplemental motion it is said: "Plaintiff accepts the accounting for the elevators and grain, as made in the majority opinion, which settled the Gribben-Alair debt, and left a fund of \$36,548.68, one third of which belongs to the plaintiff, with \$10,000 against it, but no \$3,000 against plaintiff's interest; for that is a part of the original debt of \$24,000 and twice settled by agreement of the parties."

It is true there were two settlements, but we are entirely satisfied that the book account in question has not been paid by the plaintiff. The first settlement was made on June 7, 1907, when plaintiff executed the assignment of his interest in the Gribben-Alair Grain Company, which is set out in the former opinion herein. Under the terms of the settlement then made, the plaintiff adjusted his personal indebtedness to the defendant company. He remained indebted to it in the sum of \$10,000, and it was as security for this debt that he assigned his interest in the Gribben-Alair Grain Company. The existence of this \$10,000 debt is one of the few things which is conceded by both parties. It should be remembered that the settlement made on June 7, 1907, had reference only to the *personal* indebtedness of the plaintiff to the defendant company, and had nothing to do with the indebtedness of the Gribben-Alair Grain Company. In order to clarify certain matters which will hereafter be referred to, it should be mentioned that the Minnesota Grain Company shortly after June 7, 1907, sold and assigned the \$10,000 claim which it held against the plaintiff to G. B. Gunderson, and he has since remained the owner

thereof and the holder of the security therefor. The undisputed evidence also shows that Gunderson subsequently and prior to the commencement of this action purchased the interests of Gribben and Alair, who together owned the remaining two-thirds interest in the Gribben-Alair Grain Company. (While some question was raised by the trial court during the course of the trial as to whether the action should not have been brought against Gunderson rather than against the defendant company, the defendant did not at all insist on or raise the point, and seemed to be desirous only of having the question of the ultimate liability of either itself or Gunderson determined; and the parties treated Gunderson and the Minnesota Grain Company as one for the purposes of this action, and the only question sought to be litigated was what amount, if any, is coming to the plaintiff by reason of the security which he assigned to the Minnesota Grain Company on June 7, 1907.)

The second settlement was made on March 10, 1909. The plaintiff had commenced an action on December 31, 1908, in the district court of Eddy county for an alleged conversion of the elevators involved in this controversy. Thereafter a settlement was made. The settlement was in writing. It was introduced in evidence upon the trial of this action, and bears date March 10, 1909. It was executed by both the parties to this action, and also by the Gribben-Alair Grain Company and G. B. Gunderson. The agreement specifically provides: "*That J. W. Lahart shall pay all his indebtedness to the Gribben-Alair Grain Co. as evidenced by notes and accounts that they may have against him.*" The agreement further provides: "The Gribben-Alair Grain Company shall as speedily as possible go into liquidation and dispose of all their property, collect all outstanding bills and pay all indebtedness; that G. B. Gunderson shall pay to J. W. Lahart one third of the assets of said Gribben-Alair Grain Company, when so liquidated except \$10,000, with interest from June 1, 1907, at 6 per cent, the same being the amount paid by him at that time to the Minnesota Grain Company, for account of J. W. Lahart for a one-third interest in the Gribben-Alair Grain Company." It will be noted that the agreement specifically provides for the payment by Lahart of his indebtedness,—"*as evidenced by notes and accounts,*"—to the Gribben-Alair Grain Company. Obviously there was some reason for in-

serting the provision in the agreement. And the evidence adduced in this case shows that Lahart, at the time the agreement was executed, was indebted to the Gribben-Alair Grain Company in the sum of \$5,171.50, and that \$3,171.50 of this indebtedness was upon account. The evidence also shows that this account has never been paid. In fact, plaintiff admitted the existence of this account, and also that a judgment had been obtained thereon against him in favor of the Gribben-Alair Grain Company, and that such judgment "is standing" against him. Hence, while it is true, as asserted in the petition for rehearing, that there were two settlements, it is equally true that the last settlement expressly recognized the existence of an account against the plaintiff, in favor of the Gribben-Alair Grain Company, which plaintiff agreed to pay. The undisputed evidence, including plaintiff's own admission, shows that this debt is still unpaid. While the reference to the account in the trial court's statement made orally at the close of the trial (and embodied in the former opinion herein) may be somewhat vague, the findings of fact are clear and specific, and leave no room for doubt as to what account the court had in mind. The finding relating to this matter reads: "After the closing out of the business of the Gribben-Alair Grain Company, as aforesaid, the payment of said indebtedness to the defendant, including the claim of the P. B. Mann Company taken over by it, there remained on hand on January 1, 1908, net assets and equities amounting to \$36,548.68. That, included in said net amount of assets and equities, however, was the said sum of \$3,171.50 owing by the plaintiff Lahart, which was not paid by him. That the plaintiff's one-third interest in said net assets on January 1, 1908, would be \$12,182.89 upon payment being made by him of said \$3,171.50. That the said indebtedness of \$10,000 to the defendant, with interest from June 7, 1907, to January 1, 1908, amounted to \$10,388.60, which amount together with said \$3,171.50 would make a total amount of \$13,550.10. That the accounting prayed for in this action accordingly shows of the date of January 1, 1908, the sum of \$12,182.89 to the credit of the plaintiff and \$13,550.10 to his debit."

In view of the facts stated, it is somewhat difficult to understand the reason for the assertions in the petition for rehearing with respect to the book account.

The plaintiff still claims that he has not received his share of the assets of the Gribben-Alair Grain Company. There is, however, no question as to what was received from the sale of the elevators. And while the plaintiff claims that there was a great deal more grain in the elevators on June 7, 1907, than has been accounted for, there seems to be no real basis for his claim. Certainly the evidence which he offered falls far short of sustaining the contention made. The only evidence offered by the plaintiff upon this proposition was his own testimony and that of Alair and O'Neill. Alair was the general manager of the Gribben-Alair Grain Company, and O'Neill was the man in charge of the elevator at Sykeston. When the plaintiff was first asked by his counsel as to the grain on hand in the elevators on June 7, 1907, he answered: "Yes, sir; there were several thousand bushels, *there must have been.*" A little later he stated: "We estimated there was about \$35,000 worth of grain in all of the elevators." A little later (on the same page of the transcript) he states that there was "probably \$20,000 worth of grain" in the elevator at Sykeston, and \$20,000 worth of grain in the other elevators. (It will be noted that there is a difference in value of \$5,000, in a few moments,—and all during his direct examination.) In this connection it may be mentioned that O'Neill, who had charge of the Sykeston elevator from the fall of 1906 up to and subsequent to June 7, 1907, when called as a witness in behalf of the plaintiff, testified that in his judgment there was only about 300 bushels of grain in the Sykeston elevator on June 7th. The only elevator in which the plaintiff testifies that the grain was weighed was in the elevator located at Heaton. In the others, he says, it was measured and figured. He admits that there was quite a number of storage tickets outstanding, and that some of the grain on hand was represented by such storage tickets, and that such grain belonged to the owners of the tickets.

When Alair (who was called as a witness by plaintiff) is asked how much grain there was in the elevators, he answers: "I could not tell just how much grain there was in them, the actual amount, no; only just an idea as Mr. Lahart made an examination and he gave it to me. He asked me if there was enough grain to pay out. I said I did not know. He asked me to go along with him and measure up the houses. We went out and measured up the houses *roughly.*" In answer to

another question, requesting him to give his best judgment as to the amount of grain on hand, after giving an estimate, he says: "I can tell if I see the ledger." The ledger referred to was a book kept by the Gribben-Alair Company at its office at New Rockford. This ledger was afterwards produced in court, and introduced in evidence by the defendant, and the expert accountant, Thompson, repeatedly referred to it in his testimony. He (Thompson) said that the so-called ledger "contains a complete statement of the grain in the elevators on June 7, 1907." This is in harmony with the statement of Alair that he could tell the amount of grain on hand if he could see this ledger. How can it be seriously contended that the evidence adduced by the plaintiff does in fact establish the amount of grain on hand in the elevators on June 7, 1907?

On the other hand, the defendant produced books of account showing the various receipts and expenditures. It also put upon the stand Gunderson, who testified as to these matters, as well as Mr. Thompson, an expert accountant of recognized ability, who went thoroughly into the matters in controversy. He based his testimony as to the amount of grain on hand on June 7, 1907, upon the books of the Gribben-Alair Grain Company as kept by it prior, and up to June 7, 1907. The Gribben-Alair Grain Company was awarded all profits reflected by "overages." Thompson explained the method used by him in determining the amount and value of the grain on hand on June 7th. When asked: "When you make your calculation as I understand it, you give the plaintiff the benefit of any doubt as to overages?" he answered: "Yes, sir, in every case." According to the computations made by Thompson the assets of the Gribben-Alair Company on January 1, 1908, amounted to \$36,548.68. And this amount—as he explained—included the account of \$3,171.50 against the plaintiff, to which reference has heretofore been made.

Alair testified as follows with respect to the grain shipments:

Q. Then, isn't it a fact that all the grain that was on hand, whatever amount that might have been in those seven elevators, was shipped out either to the P. B. Mann Company, or to the Minnesota Grain Company, and that the amount was received by the Gribben-Alair Company as to those sums?

A. Yes; we always got an account sales.

Q. You saw the account sales of the Gribben-Alair Grain Company shipped to or received by the Minnesota Grain Company? For all shipments?

A. Yes, sir; all the cars shipped received account sales of the shipments.

It should be noticed that the Gribben-Alair Grain Company was a going concern. It was operating elevators at seven different points in the state. It had its headquarters at New Rockford. It maintained a bookkeeper and kept its books at that place, and the different buyers in the different elevators made reports to that office. According to the understanding between the parties, all grain on hand on June 7, 1907, was shipped out, and it is undisputed that all grain had been shipped out, and also five of the elevators sold before the end of August of that year. Hence, when plaintiff entered into the settlement agreement on March 10, 1909, all moneys from the sale of grain and from the sale of the five elevators had been received. If plaintiff's contentions in this case are correct these sums would have more than paid off all debts of the Gribben-Alair Grain Company, and plaintiff's distributive share of the surplus would have more than paid off his entire debt. It is somewhat strange that the terms of the agreement are as set forth, if the plaintiff at that time actually believed the contentions which he now claims to be true.

Some reference has been made in this case to the fact that Gunderson refused to permit the plaintiff or his attorney to examine the books of the Minnesota Grain Company. It is not apparent how this could affect the admissibility of the books in evidence. In this connection it may be noted, however, that Gunderson denied that he refused to permit such examination, and claimed that he permitted Brice (Lahart's attorney) to examine them, and even to take some of them to his office. And Lahart admits that he was informed by Brice to the effect that he had been permitted to examine the books. Lahart testified: "Mr. Brice said he had got the books, that Mr. Gunderson let him have the books. He had a man in his office go through everything. He said he acted real good and let him go through everything."

Reference has also been made to the fact that Gunderson admitted that he had drawn some money out of the Gribben-Alair Grain Company's assets. The record fully discloses what was done. Gunderson was asked to give the then condition of the Gribben-Alair Grain Company. He says: "There is on hand, \$23,339.30, and Gunderson and Alair have, and it is practically myself, same thing,—\$14,637.28, the total assets are \$37,967.68; indebtedness to the Minnesota Grain Company, \$6,349.93, making the net worth \$34,326.65. In addition to that, have an account against J. W. Lahart which is in the form of a judgment for \$3,231.50." On his cross-examination he admits that he has drawn out some money and charged it to his account. Just what was wrong about that is hard to understand. He owned two thirds of the assets outright and absolutely, and he had a lien for over \$10,000 against the other one third. This lien exceeded the full amount of such interest, so Gunderson was in fact the owner of all the assets. In his testimony Gunderson was referring to entries made in books of account, which were offered in evidence. These are the same books upon which the expert accountant based his testimony, and the books are part of the record transmitted to this court.

Our reconsideration of this case on the petition for rehearing has merely confirmed our convictions that the judgment appealed from is right. The conclusion reached in our former decision must stand. A rehearing is denied.

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W. A. MARLATT, Appellant, v. EUGENE COUTURE, Respondent.

(169 N. W. 582.)

**Negotiable instruments—conditional delivery in violation of condition—maker not liable.**

1. Where a promissory note is executed conditionally, and delivery is made in violation of such conditions, no liability arises on such note.

**Promissory note—false and fraudulent representations—procured by—in-valid.**

2. Where a promissory note is procured by false and fraudulent representations, the same has no validity and the maker incurs no liability thereon.



**Corporation stock — promissory note given for — conditional making — on note illegally given no liability arises.**

3. Where a promissory note is given for corporate stock, assuming that the conditions were such that a promissory note could be legally given, no liability arises upon the note in absence of the delivery of the stock.

Opinion filed May 25, 1918. Rehearing denied November 30, 1918.

Appeal from the District Court of Rolette County, North Dakota, Honorable C. W. Buttz, Judge.

Affirmed.

*Fred E. Harris*, for appellant.

*Charles A. Verret and Flynn & Traynor*, for respondent.

GRACE, J. Appeal from the district court of Rolette county, North Dakota, Honorable C. W. Buttz, Judge.

This is an action to recover upon a promissory note for \$150. The complaint is in the ordinary form. The answer admits the execution of the promissory note, and, by way of defense, alleges a total failure of consideration, and further alleges that the note was executed conditionally upon certain alleged agreements set forth in the answer, and that the note was not to become effective until the conditions were fulfilled; that there was an express agreement between plaintiff and defendant at the time of the execution of the note, that the plaintiff should furnish the defendant certain shares of stock in the corporation known as the St. John Creamery Company, which is alleged to be insolvent at the time of the execution of the note and at all times since, and that such fact was known to the plaintiff; that the plaintiff had no right or authority to sell or agree to sell such stock and was unable to and never did deliver such stock to defendant. There were further allegations in the answer as to representations, and an express promise on behalf of the plaintiff that the buildings and machinery of the St. John Creamery Company, which was not then in operation, should be fixed up and put in good operating condition within a reasonable time after the execution of said note; that the plaintiff would cause said St. John Creamery Company to resume its operation in first-class shape within reasonable time. Then follows the allegation that such representations were false and fraudulent, and made for the sole purpose or

obtaining the signature of the defendant, and allegations that none of the conditions were performed by the plaintiff. The facts in the case are as follows:

In 1909, the plaintiff had constructed a creamery at St. John, North Dakota. This company was incorporated under the laws of North Dakota, and its stockholders were farmers and business men in the vicinity of St. John. Plaintiff had a mortgage upon the creamery and its contents. Plaintiff was in the business of selling creamery machinery. In 1913, the creamery, for a time, ceased to do business.

It is contended by plaintiff that, at the time of getting new subscriptions and notes and the promissory note in question, he was getting them as additional security for the protection of the debt due him. The defendant denied that he had any knowledge that the plaintiff was taking the new subscriptions for that purpose at the time he gave the note in question. The note was executed with the understanding and agreement that the defendant would get three shares in the St. John Creamery Company, which shares were never delivered to the defendant. The following indorsement was on the back of the note: "Collateral to St. John Creamery Company notes and mortgages for \$4,300 dated October 22, 1909."

The defendant denies that such indorsement was on the note at the time of its execution. The following is the agreement set forth in the subscription list:

"For value received, we, the undersigned, hereby agree to pay the sum set opposite our respective names, in cash, to W. A. Marlatt, for which shares of stock will be issued by the St. John Creamery Company, said sum was, when paid in cash, to be applied on mortgage given to said, W. A. Marlatt by St. John Creamery Company, and the balance, if any, to be paid over to the St. John Creamery Company and may be used as surplus or working capital. If any notes given same will be held as collateral security to mortgage notes." The defendant signed this subscription list.

Defendant claims, at the time he signed the note, the plaintiff represented to him he would get Mr. Hagan from Devils Lake for manager in such creamery, who, it appears, was regarded as very competent for that position. The plaintiff denies this and claims that what he said to Mr. Clifford while at the bank when the note was signed was, that

he would get Mr. Hagan or someone equally as good. Plaintiff claims he made no representation about putting the plant in first-class shape. In fact, there is practically a conflict of testimony on all these alleged representations. Clifford, the cashier of Rolette County Bank, where the note was signed, testifies that at the time just before the note was signed, there was talk between Marlatt, Couture, and himself with reference to the deal, and that Marlatt said to him he would endeavor to get Mr. Hagan to run the creamery. Clifford testified that all notes and money went to Marlatt. McPherson, another witness, testified that on exhibit 3, the subscription list, he subscribed \$100 and paid it. He testified that Mr. Marlatt represented to him he intended to get Mr. Hagan to run the creamery, and that this money was going to be appropriated to the keeping up of the creamery. The testimony of Cain is largely to the same effect, neither of these witnesses were theretofore connected with the creamery.

Whether Marlatt represented that he would get Hagan as manager or whether he would put the creamery in operation, and whether the note was signed by reason of such representations made by the plaintiff, were all disputed questions of fact which were properly submitted to the jury, as well as the question of fact of whether the stock was delivered.

Thomas Clifford, the cashier of the bank, and Marlatt, had a conversation which commenced in front of the bank; and, in reference to such conversation, Wright testified as follows:

"The way the conversation started, Mr. Clifford introduced me to Marlatt and we shook hands, and Tom says, 'We got a proposition for you, Elmer,' and I says, 'What is it?' and he says, 'Come on in,' and we merely stepped through the door. We had been talking on the street up to that time, and we stepped through the door of the bank, and nearly all this explanation took place just inside the door. He says, 'We are talking about starting the creamery up next spring,' and then I think it was Mr. Marlatt that spoke up, and he said, 'Mr. Wright, there isn't any reason why your creamery couldn't run and be a success the year around,' and I says I didn't see why it shouldn't run the year around myself. Then Mr. Marlatt says, 'The way you can keep that running is to go to it and sell more stock. Get around to all the men in this country and sell them stock and with the money you raise from that put

your creamery in working shape.' And then Hagan had been talked of for months and came up in this way: I says, 'If we had Hagan back, he could make it pay,' and he says, 'Hagan will come,' and he told me he had left Hagan that day, or the day before, or a day or two before that, he had come from the lake, and that he had his promise he would come, and I says, 'All right, if Hagan will take it I will subscribe for more stock,' and then he says, 'Tom Clifford is taking more stock and I will take \$150 worth,' and I says, 'All right, if that is the case, put me down for \$150,' and then it seems I signed up. I never got the stock certificate like they was supposed to issue. There was more to that conversation too. Then it was that Mr. Marlatt said he could keep the creamery running and buy butter and eggs and keep it running the year round, and I told them of an incident where I talked with a man who was sending his cream down below on account of getting a little more for it, and they suggested that we all work together and see these parties and interest them, and get them to get some stock even if it was only one share for \$50, and then I says, 'Supposing this thing don't materialize, will our notes be still held?' and I don't remember which man says, 'No, they won't,' but Mr. Marlatt also told me he was going to take stock in it too, so I says, 'If it doesn't materialize, what will come of our notes?' and one or the other of them, I don't remember which one, said, 'If this deal don't materialize, they won't be used,' and I didn't know they had been used until later and there was some agitation about it. I haven't heard from mine and I didn't know it was used until later."

Upon cross-examination, the same witness testified as follows:

"They told me these notes wouldn't be used if they weren't used to start the creamery up and put it in operation. They didn't say forever and ever. They were going to get it running good and keep it going."

It was shown by the testimony of Lyman, another witness, that the board, meaning the creamery board, took up the proposition of obtaining money from Mr. Marlatt which he obtained by the subscriptions. He testified that Mr. Wheaton was president of the board, and the board authorized Wheaton to write Marlatt that:

"We decided to put the creamery in operation and ask him for money. He was in Winnipeg at the time, and Mr. Wheaton, the president, wrote him."

Witness's testimony also shows that Mr. Marlatt did not help in getting the plant in operation at any time since the 29th day of November, 1913. Marlatt denies all these representations both as to whether made by himself or Clifford, and denies that he ever authorized anybody to make any such representations for him.

There are three main defenses to the note:

1. That it was executed conditionally.
2. That the note was procured by reason of false and fraudulent representations of the plaintiff.
3. That there was no consideration for the note.

The question whether the false and fraudulent representations were made was a question of fact for the jury. There was testimony given at the trial tending to establish the false and fraudulent representations alleged to have been made.

Sufficient testimony has been set out to fully demonstrate this. The testimony was conflicting, but the jury were the exclusive judges of the weight and credibility of the testimony of the witnesses; and it having found in favor of the defendant, its finding is conclusive in this regard. The making of the false and fraudulent representations at the time of securing the execution of the note is established as a fact by the verdict of the jury. Defendant's signature to the note having thus been obtained by false and fraudulent representations above referred to, he incurred no liability by reason of having signed said note, and is under no obligation by reason of having signed it, and he had the undoubted right, under the circumstances, to repudiate the alleged contract; that is, the note.

The testimony also shows that the stock for which the \$150 note was given was never delivered to defendant. At the time of the execution of the note, the creamery company was not a going concern, and was practically insolvent. Although the defendant had previously been a stockholder in the creamery company, there was no consideration for the new note given for additional shares of stock, unless there was a delivery of the stock. The contract for the purchase of the additional shares is a separate and distinct contract from any other connection which the defendant had with the creamery company by reason of having theretofore purchased three other shares for \$150. If the \$150 note was given in payment of the new shares, and if this could lawfully

be done, the defendant was entitled to receive such new shares. The contract must have the stamp of mutuality. If the note could be accepted for the payment of stock the stock must be delivered. If both are not bound, neither is bound and the transaction is a nullity. 1 Thomp. Corp. § 570.

Section 4529, Compiled Laws 1913, provides that no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock; but the capital stock shall be paid in, either in cash or in the manner provided in this article.

Section 4531, Compiled Laws 1913, provides that a corporation may purchase, hold, and transfer shares of its own stocks from its surplus profits, or as provided in the article on assessments of stock, or by the unanimous consent in writing of all its stockholders, in such manner and for such price or consideration as the said stockholders may unanimously decide upon.

In view of these provisions and the decision of this court in the case of Jackson v. Sabie, 36 N. D. 54, 161 N. W. 722, it would appear that the note in question would have no validity, though from the record it would appear that such issue is not presented to this court in this case. Hence we need not notice such matter further.

It is also very doubtful, under all the circumstances in this case, if there was any proper delivery of the note. If it were not to be delivered until compliance with all the conditions alleged to have been agreed upon by the parties, a delivery in violation of such agreement would be no valid delivery, and the note would not, under these circumstances, be a binding obligation, and would, in fact, be a nullity.

The verdict of the jury is well sustained by the evidence. The conclusion we have come to in this case is well sustained by the very recent decision of this court, and in the case of Raich v. Lindebek, 36 N. D. 133, 161 N. W. 1026, and Jackson v. Sabie, 36 N. D. 49, 161 N. W. 722.

The order denying motion for judgment notwithstanding the verdict, and the order denying a new trial, are in all things affirmed, with costs.

### On Petition for Rehearing.

**PER CURIAM.** Plaintiff has petitioned for a rehearing. His petition is to some extent a reargument. But he also complains because a question raised with respect to the admissibility of certain evidence was not passed upon in the opinion. This question was considered by the court, but was not referred to in the opinion. It will be remembered that the note involved in this action was given for corporate stock. The defendant at the time of its execution also signed a certain stock-subscription agreement. A regular stock-selling campaign was carried on among the farmers in the vicinity of St. John, and the stock-subscription agreement was signed by many different persons. The plaintiff was the person primarily interested in the sales campaign. He interviewed the various subscribers. The defendant placed upon the stand other subscribers to show that the plaintiff made representations to such other subscribers similar to those which he made to the defendant. Plaintiff asserts that the admission of this testimony was error. While it is true, as plaintiff asserts, that "the law will not, as a general rule, permit an inference to be drawn that a person has done a certain act merely because he has done a similar act at some other time, it is also true that this rule is subject to certain well-recognized exceptions." And, "where the fraudulent intent of a party in the performance of an act is in issue, proof of other similar fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question, when it appears that there is such a connection between such other acts and the act in question as to authorize the inference that both are parts of one scheme or plan, in which the same motive is operative." 6 Enc. Ev. 33. The jury was informed by the trial court that the evidence in question was admitted for certain limited purposes. Under the facts existent in the case at bar, we believe the evidence in question was admissible. The other acts were all part of one plan or scheme. There was one common end sought by the plaintiff and his associates in the stock-selling scheme. We find no reason to recede from the conclusions reached in the former opinion.

**Rehearing denied.**

**McCAULL-WEBSTER ELEVATOR COMPANY, a Corporation,  
Respondent, v. A. G. STILES, Frances Stiles, and Maud E.  
Stine, Appellants.**

(169 N. W. 577.)

**Mechanic's lien — foreclosure — action for — judgment — supported by facts.**

This is an action for the foreclosure of a mechanic's lien. The facts stated in the opinion show that the judgment in favor of plaintiff is clearly right and it is affirmed.

Opinion filed June 1, 1918. Rehearing denied November 30, 1918.

Appeal from the District Court of Hettinger County, Honorable *W. C. Crawford*, Judge.

Defendants appeal.

Affirmed.

*Charles Simon*, for appellants.

Plaintiff did not keep an itemized account of the materials it furnished, separate and apart from all other items of account against the purchaser, as by law provided, and therefore it had no valid lien. Comp. Laws 1913, §§ 6814, 6815; *Larkins v. Blaken*, 42 Conn. 204; *Talbott v. Goddard*, 79 Am. Dec. 277, note.

A mechanic's lien will not attach to the interest of a vendor upon an executory contract of sale, whose vendee is in possession and makes improvements by erecting buildings on the real estate covered by such executory contract. *Johnson v. Soliday*, 19 N. D. 463.

*Thomas H. Pugh* and *Otto Thress*, for respondent.

"The inclusion in a lien claim of items for which the law does not in any event give a lien will not affect the validity thereof as to the lienable items, in the absence of fraud or bad faith, if the lienable items may be segregated upon inspection of the account and the lienor is justified in believing himself entitled to the whole amount." Note in 29 L.R.A. (N.S.) 314.

A liberal rule for the construction of mechanic's lien statutes has been adopted in this state. *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Salzer Lumber Co. v. Claffine*, 16 N. D. 601, 113 N. W. 1036; *Robert-*



son Lumber Co. v. Clark, 24 N. D. 134, 138 N. W. 984; Note in 29 L.R.A.(N.S.) 306; Westside Lumber Co. v. Herald (Or.) 128 Pac. 1006, Ann. Cas. 1914D, 876.

The consent of defendants to the delivery of the materials is shown by the writing itself signed by them. The presumption is that it was properly dated, and that the usual course of such business was followed, and that the plaintiff's manager knew the law and that he followed it.

ROBINSON, J. On January 10, 1914, Stiles and wife made a duplicate written contract with the plaintiff to furnish lumber and material to erect buildings and improvements on a quarter section of land owned by them. (Southwest 13-135-97.) In said contract it was agreed that a mechanic's lien be filed as security for the price of such material. Material was furnished to the amount of \$1,342.30 between June 15 and November 27, 1914. Stiles and wife appeal from a judgment in favor of the plaintiff.

The defense is purely technical. It has no merit. It is said: No consent was given that a lien might be filed; no demand for payment was made before filing the lien; no written notice was served of an intention to foreclose the lien. They made a settlement with the plaintiff on account of the price of such material and gave the plaintiff their promissory note for \$1,526.45. They pray that plaintiff take nothing by this action except a money judgment for \$1,526.45 and interest at 8 per cent from December 8, 1914, and that the mechanic's lien be canceled.

This action was commenced in April, 1915. The judgment was given March 10, 1917. The appeal was taken August 30, 1917, and filed in this court February 23, 1918, so the case has been worked for delay doubtless with the hope that defendant may secure a good crop and pay the lien. Maude Stine is a sister of Mrs. Stiles and her answer is that she owns the land. Charles Simon is the attorney for her and the other defendants and he verifies the answers of each. Now if she owns the land then the others do not own it, and they have no reason to defend against the lien. The deed to her includes the west three fourths of said section 13. The title of the land was in the name of Frances Stiles and just before the building of the house she deeded the land to her sister Maude for an express consideration of \$9,600. Maude

does not appeal from the judgment because the deed to her is a manifest sham. The testimony given to sustain and bolster up the deed does tend strongly to impeach all the defendants and to show them parties to a dishonest deal. First they make a sham deed of the land to the sister; then they go and contract for material to construct buildings on the land, and in writing certify that the contract is executed in duplicate and one copy retained by them. That notice has been given that a mechanic's lien may be filed for material furnished under the contract and "I hereby consent that such lien may be filed as security for materials furnished me for the character of improvements above indicated. Signed. A. G. Stiles, Frances Stiles."

The note for the material was duly made by Mr. and Mrs. Stiles. There is no claim that it was not past due when the suit was brought or that it was for an excessive amount. There is no claim of fraud or mistake. When the note became due it was the duty of the makers to pay it without waiting for any demand. The statute providing for notice before suit contemplates an open account on which a party should not be put to the expense of a suit without a demand for payment, but even if it were an open account, the failure to make a demand would only defeat the right to recover costs up to the time of the answer. An answer showing a failure to demand payment is futile when it shows that the demand would have been futile. The law does not require idle acts. The findings of fact and the conclusions of law as made by the trial court are clearly right.

Judgment affirmed.

GRACE, J. I concur in the result.

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GILFORD YORK, Respondent, v. GENERAL UTILITIES CORPORATION, a Foreign Corporation, and James Rheinfrank, Appellants.

(170 N. W. 312.)

**Personal injuries — damages — action to recover — negligence of defendant — instructions — error — new trial.**

This is a personal injury suit in which plaintiff seeks to recover for an

injury resulting from the alleged negligence of the defendants. For error in the instructions, the judgment is reversed and the case remanded for a new trial.

Opinion filed November 30, 1918.

Appeal from the District Court of Eddy County, Honorable C. W. Butz, Judge.

Defendants appeal.

Reversed and new trial ordered.

*Lawrence & Murphy* and *Watson, Young, & Conmy*, for appellants.  
*Rinker & Duell, Julian E. Brown, D. J. Holihan (T. D. Sheehan,*  
of counsel), for respondent.

ROBINSON, J. This is an action to recover for a grave personal injury resulting from the alleged negligence of the defendants. They appeal from a verdict and judgment against them for \$14,750. It does not appear that a motion for a new trial was made and denied, but that is of no consequence. Unless directed by the judge no motion for a new trial is necessary to obtain an appeal, a review of the questions of law or the sufficiency of the evidence. Laws 1913, chap. 131.

The complaint avers, and it is true, that in New Rockford on July 6, 1916, the defendant corporation owned and operated an electric light and power plant and furnished electricity for light and power at the residence of W. J. Payne. Also that James Rheinfrank was in charge of and had the control and management of the plant. Also that on July 6, 1916, the plaintiff was an electrician, and as such he was employed by one V. E. Beaudry. That at said time by direction of his employer, and in performance of his duties, the plaintiff undertook the repair of an electric light and wire fixture at the residence of W. J. Payne. He went into the cellar and, with an assistant, found an electric wire burned and severed, with two ends dangling. For protection he stood on a board and then took hold of one end of the wire and at the same time caused his head to come in contact or in close proximity to a grounded iron pipe so as to complete the electric current. Instantly the blue electric flames played between his head and the iron pipe holding him fast until his helper ran up stairs, pulled the switch, and shut off the electric current. Then the assistant telephoned for a

doctor and for help, and quickly they ran down stairs, and finding the plaintiff unconscious, they carried him to a room and gave him proper care. For two weeks he was confined to his bed. Then he passed about six months in a state of convalescence, and commenced working at \$50 a month. Prior to the injury his earnings amounted to about \$130 a month.

The plaintiff suffered from some burns on his left hand, on the crown of his head, and on other parts of the body, and from nervous shock and incidental pains. But his greatest loss was the injury to his right hand. He lost the ring finger, which had to be amputated at the third joint, and thus far he has lost the use of the other fingers by reason of the fact that in healing the fingers were permitted to grow together with a new tissue flexing or binding them down toward the palm of the hand. However, that condition is not necessarily permanent. It may be relieved by a simple and easy surgical operation, severing the new tissue that binds the fingers and prevents their use. The joints of the fingers and the tendons which move them are not materially injured. The injury to plaintiff is not in any way comparable with the loss of a hand or a foot. It does not necessarily shorten his life or his capacity of enjoying life, though the practical loss of his fingers does materially lessen his working and earning capacity.

However, it does seem that in any event the verdict is quite excessive because prior to the injury the net earnings of plaintiff were not more than the net income from \$15,000, and though it is doubtless true that the defendants are not blameless in the care of their electric wires, it is equally true that the plaintiff is not without fault, and that his own negligence and want of due care was the direct and proximate cause of his injury. It is a case where the law ought to apportion the damages to each party according to the amount of his negligence,—as in railroad cases. Section 4805.

Defendants aver that the verdict is excessive and that it is not sustained by the evidence; that the injury sustained by plaintiff was the direct result of his negligence, and that the court erred by refusing to give the jury certain requested instructions and by giving instructions contrary to law. On its merits the case presented is one of negligence and contributory negligence. Negligence is the want of ordinary care and prudence. Section 10,358.

"Every one is responsible not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself." Section 5948.

"A principal is responsible to a third person for the negligence of his agent in the transaction of the business of agency." (Sec. 6356.)

"Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or *certain to result in the future.*" Section 7141.

The twelfth assignment of error is that the court erred by instructing the jury thus: "In passing upon the matter of damages you may consider the injuries plaintiff received, the likelihood of the injuries being permanent, the pain he has suffered or may be likely to suffer in the future." Clearly that instruction is directly contrary to the statute which limits damages to those *certain to result in the future.* Ibid.

In this case, however, the main question is on the point of contributory negligence. It does appear that by want of ordinary care and caution, the plaintiff brought the injury upon himself. As he well knew, there was a safe way for him to do the business and there was no occasion for him to incur the least risk. Before going into the cellar, in the fraction of a moment, and without the least effort, he could have pulled, or directed his assistant to pull, the switch and shut off the electric current, and then he would have been perfectly safe. And when he went into the cellar and stood on a board and took in his hand one end of the dangling wire, he was still perfectly safe if he had not by carelessness put his head against a grounded iron pipe. It was the contact of his head with the grounded iron pipe that closed the circuit and caused the electric current to run through his body, and no one knew better than he the danger of permitting his head to come in contact with any iron pipe.

On the point of contributory negligence there can be no dispute, and there is no evidence to sustain a verdict for the plaintiff. His own testimony is conclusive against him. On his testimony it clearly appears that he has no cause of action.

The judgment is reversed and a new trial ordered.

BRUCE, Ch. J. (concurring specially). I concur in the above opinion with the qualification that if negligence were proved and the instructions free from error, I would hardly have held that the verdict was so excessive as to justify a reversal.

GRACE, J. I concur in the result arrived at herein by a majority of the court that the case should be reversed and a new trial granted.

CHRISTIANSON, J. (concurring specially). In this case the defendant challenged the sufficiency of the evidence by motion for a directed verdict at the close of all the testimony. The opinion prepared by Mr. Justice Robinson in effect holds that such motion should have been granted. While there is much force to this contention, I am not entirely clear that it can be said as a matter of law either that there was no evidence of negligence on the part of the defendant, or that the plaintiff was guilty of contributory negligence as a matter of law. Nor do I believe that it can be said as a matter of law that the verdict is excessive. I agree with Mr. Justice Robinson, however, that the court erred in its instructions. Not only did the court instruct the jury that the jury might allow damages for injuries "likely" to be permanent, and for pains which plaintiff was "likely to suffer in the future," as stated in Mr. Justice Robinson's opinion, but it refused to give a requested instruction to the effect that a verdict for damages cannot be based upon speculation or conjecture. The court also refused to instruct the jury (pursuant to request for such instruction) as to the duty incumbent upon a person in the exercise of due care to select a safe, rather than a dangerous, way of performing a duty, where both a safe and an unsafe way are available. I believe a proper instruction upon this subject should have been given. Hence, I believe that the case should be reversed and a new trial had.

BIRDZELL, J. I concur in the reversal and remand of this case on account of the prejudicial instruction.

**WILLIAM MAAS FOR THE USE AND BENEFIT OF WILLIAM  
H. WOLFE, Respondent, v. CLARENCE J. WILLBUR et al.,  
Appellants.**

(170 N. W. 325.)

**Advance claims — action to determine plaintiff's title — under mortgage foreclosure — defendant without title.**

This is an action to determine an adverse claim to a quarter section of land. The plaintiff has title under a mortgage foreclosure. The long answer of defendant covers twelve printed pages. It shows clearly and specifically that the plaintiff has title and defendant has no title.

Opinion filed November 30, 1918.

Appeal from the District Court of Eddy County, Honorable C. W. Nuessle, Special Judge.

Affirmed.

W. H. Stutsman and C. R. Jorgenson, for appellant.

By demurring, plaintiff admits all the allegations contained in the defendant's counterclaim, which are well pleaded. 6 Am. & Eng. Enc. Law, 2d ed. p. 334; Cumins v. Lawrence County, 1 S. D. 158, 46 N. W. 181.

The filing of the *lis pendens* was notice to every person dealing with the land, subsequent to its filing. N. D. Code Civ. Proc. § 6837; Buxton v. Sargent (N. D.) 75 N. W. 811; Multon v. Kolodzik (Minn.) 107 N. W. 154; Wholen v. Stewart, 108 N. Y. Supp. 355; R. R. V. Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 191; O'Toole v. Omlie, 8 N. D. 444; Niles v. Cooper, 13 L.R.A.(N.S.) 49, 107 N. W. 744; James v. Wilkinson, 2 Kan. App. 361, 42 Pac. 735; Bank v. Allen (Mich.) 86 N. W. 383; Horbock v. Potter (U. S.) 18 L. ed. 30.

In addition to filing *lis pendens*, defendant was in actual open and exclusive possession of the premises at the time plaintiff claims to have acquired title, and this occupation was notice to the world of his claim, and precludes the claims of innocence. N. D. Code Civ. Proc. § 6837; Buxton v. Sargent (N. D.) 75 N. W. 811; Multon v. Kolodzik (Minn.) 107 N. W. 154; Wholen v. Stewart, 108 N. Y. Supp.

355; R. R. V. Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 191; O'Toole v. Omlie, 8 N. D. 444; Niles v. Cooper, 13 L.R.A. (N.S.) 49, 107 N. W. 744; James v. Wilkinson, 2 Kan. 361, 42 Pac. 735; Bank v. Allen (Mich.) 86 N. W. 383; Horbock v. Potter (U. S.) 18 L. ed. 30.

The legal title to such land, obtained while in such adverse possession, cannot override the equities of the occupant. *Pittyman v. Wilky*, 19 Ill. 236; *Wicks v. Lake*, 25 Wis. 71; *Philips v. Blair*, 38 Iowa, 649; *Niles v. Cooper*, 13 L.R.A. (N.S.) 49.

The purchaser is estopped to set up title to the premises adverse to such equities. *Pittyman v. Wilky*, 19 Ill. 236; *Wicks v. Lake*, 25 Wis. 71; *Philips v. Blair*, 38 Iowa, 649; *Niles v. Cooper*, 13 L.R.A. (N.S.) 49.

The deed given, and under which title is here claimed, was executed and delivered long after the filing of the *lis pendens* and while defendant was in such open and exclusive possession, and was therefore void. N. D. Penal Code, §§ 8732, 8733; *Galbrith v. Payne* (N. D.) 96 N. W. 258.

The mortgage given to Maas was invalid and, therefore, Maas had no such interest as would constitute him a redemptioner. N. D. Code Civ. Proc. § 7139; N. D. Civ. Code, § 6158; 27 Cyc. 1804; *Mullens v. Wimberly*, 50 Tex. 457; *Skinner v. Young* (Iowa) 45 N. W. 889; 27 Cyc. 1822, and cases cited.

It is conceded that the rule is that where mortgagor fails to redeem within the statutory time, he loses all interest in the property. But, there is a well-recognized exception to this rule, and, under the facts and circumstances here presented, this case falls within such exception. N. D. Code Civ. Proc. § 7139; N. D. Civ. Code, § 6158; 27 Cyc. 1804; *Mullens v. Wimberly*, 50 Tex. 457; *Skinner v. Young* (Iowa) 45 N. W. 889; 27 Cyc. 1822, and cases cited.

Where the mortgagor has suffered a lapse through fraud and deception practiced upon him, or, through ignorance of his rights, or by accident, he may maintain a bill in equity to redeem. 27 Cyc. 1848; *Nunan v. Locke*, 36 N. W. 166; *Nolan v. Dyer*, 77 N. W. 786; *Benson v. Benting*, 59 Pac. 991.

*Sullivan & Sullivan*, for respondent.

The mortgage foreclosed was a valid one, and no redemption was



ever made from the foreclosure; the foreclosure, sale, and issuance of certificate being all regular and valid proceedings. *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700; *Comp. Laws* 1913, § 9407; *State Finance Co. v. Halstenson*, 17 N. D. 145.

The only person who may question the redemption made by plaintiff is the holder of the sheriff's certificate, and he is not complaining. 17 Am. & Eng. Enc. Law, 1035; 27 Cyc. 1834, 1835; *Jones, Mortg.* ¶ 1055 a; *Clingman v. Hopkie*, 78 Ill. 152; *Pence v. Armstrong*, 95 Ind. 191; *Smith v. Jackson*, 153 Ill. 399; *Smith v. Mace*, 137 Ill. 68; *Pearson v. Pearson*, 131 Ill. 464; *Meyer v. Mimtonye*, 106 Ill. 414; *McDonald v. Beatty*, 10 N. D. 511.

The acceptance of money offered for redemption is an admission of the right of the person tendering it to redeem, and effects a valid redemption even though such person was not in fact entitled to redeem. 17 Am. & Eng. Enc. Law, 1035; 27 Cyc. 1834, 1835; *Jones, Mortg.* ¶ 1055a; *Clingman v. Hopkie*, 78 Ill. 152; *Pence v. Armstrong*, 95 Ind. 191; *Smith v. Jackson*, 153 Ill. 399; *Smith v. Mace*, 137 Ill. 68; *Pearson v. Pearson*, 131 Ill. 464; *Meyer v. Mimtonye*, 106 Ill. 414; *McDonald v. Beatty*, 10 N. D. 511.

By such redemption, plaintiff was clothed with all statutory rights under the sheriff's certificate of sales. It is well settled that such is the effect of accepting and retaining money paid to redeem from sales. *Carver v. Howard*, 92 Ind. 173; *Hare v. Hall*, 41 Ark. 372; *Re Eleventh Ave.* 81 N. Y. 436; *Freeman, Executions*, 3d ed. ¶ 317; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322; *Hervey v. Krost*, 116 Ind. 368, 19 N. E. 125; *Massey v. Westcott*, 40 Ill. 160; *McClure v. Englehart*, 17 Ill. 47; 27 Cyc. 1812; *Millard v. Truax*, 50 Mich. 343, 15 N. W. 501.

**ROBINSON, J.** This is an action to determine an adverse claim to a quarter section of land (N. E. quarter 34-133-85), and defendant Willbur appeals from a judgment against him on a demurrer to the answer. The answer shows that the plaintiff has title and that Willbur has no title to the land. It shows: In March 1912, the mother-in-law of Willbur owned the land and he owned an adjoining quarter section. He purchased the quarter section from his mother-in-law. Then by fraud and sharp practice John Johnson and N. Gillies, in-

duced Willbur to convey to them the half section in consideration of \$1,000 in cash and some Tennessee land of little value.

Willbur caused his mother-in-law to convey directly to John Johnson the land described in the complaint. John Johnson at once gave to Johnson-Van Sant Company a mortgage on the land for \$1,200, and a mortgage for \$196. It was May 24, 1912. Then in January, 1914, John Johnson conveyed the land by warranty deed to Krain Rosholt. Then Rosholt made to Clara Johnson a mortgage for \$2,000 and she assigned the same to K. Rosholt. Krain Rosholt also mortgaged the land for \$425; and in June, 1915, he made to William Maas a mortgage for \$300. On June 8, 1914, the second mortgage made to John Johnson Van Sant Company was duly foreclosed and on June 8, 1915, William Maas redeemed from the mortgage foreclosure and obtained a certificate of redemption and a sheriff's deed which gave him title to the land.

Willbur then tried to rescind the sale of the land and brought an action to rescind, and went upon the land and held possession of the same since December, 1912. He avers that when the deed was made to Krain Rosholt, and at all times since then, he was in the open, notorious, and exclusive possession of the land, but that is all a matter of no consequence. Under the statute on transfers, the owner of the legal title had a perfect right to transfer and mortgage it regardless of his possession.

The answer contains not a word to impeach the mortgage that was foreclosed, nor the foreclosure of the same, nor the right of the purchaser at the sheriff's sale to permit a redemption by William Maas or to transfer to William Maas his certificate of sale. It does aver that by reason of the several transfers and mortgages, the title to the land was cloudy and defendant was prevented from redeeming and borrowing money on the land to redeem. But from the time that defendant foolishly conveyed away his title to John Johnson he never had any title on which to borrow money or to redeem. The long answer of defendant covers twelve printed pages. It shows clearly and specifically that the plaintiff has a good title and that the defendant has no title.

Judgment affirmed.

GRACE, J. I concur in the result.

41 N. D.—10.

**JOSEPH WEIDERHOLT and Henry J. Geisler, Appellants, v. LISBON SPECIAL SCHOOL DISTRICT NO. 19, the Board of Education of Lisbon Special School District No. 19, W. F. Grange, Alfred M. Kvello, Thomas A. Curtis, A. C. Cooper, C. D. Clow, and W. S. Adams, Respondents.**

(169 N. W. 809.)

**Special school district — board of directors — citizens and taxpayers — action by — affecting proceedings of board — nonexistence of facts necessary to give board authority to act — complaint shows — course of action stated.**

In an action brought by citizens and taxpayers residing within an area affected by the proceedings of a board of directors of a special school district annexing territory to the district, it is *held*:

1. That a complaint which alleges the nonexistence of facts required to give the school board authority to enlarge the district states a cause of action.

**Proceedings of school board — in reforming a district — by adding territory — common law — writ of quo warranto — tested by — civil action lies in this state — district court.**

2. The legality of proceedings of a school board in reforming a district by adding territory thereto, which could have been tested at the common law by a writ of quo warranto or by information in the nature of quo warranto, may be tested in this state by a civil action in the district court under § 7969 of the Compiled Laws of 1913.

Opinion filed December 10, 1918.

Appeal from District Court of Ransom County, *Allen, J.*

Plaintiffs appeal.

Order reversed.

*Kvello & Adams*, for respondents.

It is no reason why certiorari will not lie in such cases because there may be matters outside the record of which complaint is made. *Re Dance*, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733; *Code Civ. Proc.* art. 2, chap. 34; *Comp.* 1887, §§ 5507 to 5516; *Comp. Laws*, 1913, §§ 8448, 8451; *Requisites of Writ*; 6 Cyc. 827, 830; *Stumpf v. San Louis Obispo County* (Cal.) 82 Am. St. Rep. 350.

The evidence may be exercised to determine the jurisdiction of the inferior court or tribunal. 6 Cyc. 806, 807, 827, 830; *People v. Knowles*, 47 N. Y. 415; *State v. Neosho*, 57 Mo. App. 192; *Stumpf v. San Louis Obispo County* (Cal.) 82 Am. St. Rep. 350.

If the facts and errors are extrinsic and do not appear of record, they may be shown *aliunde*, and especially to show fraud. *Ibid*.

The court may order a reference to determine disputed facts. 6 Cyc. 761, 762, note 89, 790, 831; *Wistar v. Ollis*, 77 Pa. 291; *People v. Brooks*, 40 How. Pr. 165; *People v. Cholwell*, 6 Abb. Pr. 151; *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715; *State ex rel. Dollard v. Hughes County*, 1 S. D. 292, 46 N. W. 1127.

An injunction will not be granted where relief may be obtained by appeal or certiorari. 22 Cyc. title "Injunctions" 775; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841.

The complaint contains allegations of all necessary facts, and the court will take cognizance of the various legal steps intervening between the various acts of the board, and the presumption that the board has complied with the law will prevail, unless this is rebuttable in an action of a collateral nature, such as this one. *Cleveland School Dist. v. Hannaford Special School Dist.* 20 N. D. 393.

It is not necessary to have stated within the petition that the signers constitute a majority of the qualified electors. *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; *Lawrence County v. Hall*, 70 Ind. 469; *Currie v. Paulson*, 43 Minn. 411, 45 N. W. 854; *Ellis v. Karl*, 7 Neb. 381; *Bennett v. Hetherington*, 41 Iowa, 142; *Baker v. Louisa County*, 40 Iowa, 226; *Redfield School Dist. v. Redfield Independent School Dist.* 14 S. D. 229, 85 N. W. 180; *State ex rel. Laird v. Gang*, 10 N. D. 331, 87 N. W. 5; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357; *Nofire v. United States*, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; *Delaney v. Schuette*, 49 Wis. 366, 5 N. W. 796; *Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; *School Dist. v. Thompson*, 27 N. D. 459, 146 N. W. 727.

The presumption is that public officials have done and do their duty. *M. O. Thompson and Charles S. Ego*, for appellants.

The complaint does not contain a statement of facts sufficient to constitute a cause of action.

The facts in many respects show that the steps prerequisite and necessary to give the board jurisdiction and authority to act had been taken, such as a proper petition, notice, and then proper findings of board. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8; *State ex rel. Johnson v. Clark*, 21 N. D. 526; *Lutien v. Kewaunee (Wis.)* 126 N. W. 662; *Glaspel v. Jamestown*, 11 N. D. 86; *State v. Holcomb (Kan.)* 149 Pac. 684; *Hughes v. Ewing (Cal.)* 28 Pac. 1067; *Doherty v. Ransom County*, 5 N. D. 1; *Glaspel v. Jamestown*, 11 N. D. 86; *State v. Budge*, 14 N. D. 532; *Morton v. Holes*, 17 N. D. 154; 8 Cyc. 830.

The power to annex territory is legislative. *Ibid.*

Such power can be sustained in municipal corporations only on the theory that it operates locally and for self-government purposes. *Ibid.*

School districts are public corporations for school purposes. *Comp. Laws 1913*, § 1140; *State ex rel. Laird v. Gang*, 10 N. D. 331; *Stern v. Fargo*, 18 N. D. 289; *State ex rel. Minihan v. Nyers*, 19 N. D. 804; *Pronovost v. Brunette*, 36 N. D. 288; 35 Cyc. 899, 901.

Being political agencies of the state, organized for a single purpose, their powers are herewith, and when a statute confers arbitrary power it must be strictly construed. *Ibid.*

School boards have no powers excepting those expressly granted and those necessarily implied from those which are granted. *Ibid.*

Injunction is the proper remedy to determine the validity of these annexation proceedings in so far as they form the basis for levying taxes. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8; *State ex rel. Ladd v. District Ct.* 17 N. D. 285; *Bartells Oil Co. v. Jackman*, 29 N. D. 236; *State v. Fisk*, 15 N. Y. 219-225; *Forsythe v. Hammond*, 68 Fed. 774; *High, Inj.* § 1254; 5 *Pom. Eq. Jur.* §§ 321, 322; *Payne v. English (Cal.)* 21 Pac. 952; *Nelson v. State Bd. (Ky)* 50 L.R.A. 383; *People v. Canal Bd.* 55 N. Y. 390.

Jurisdiction of such boards as defendant may be disputed at any time. *Rees v. Wildman*, 35 Atl. 1047; *Scott v. McNeal*, 154 U. S. 34; *Wales v. Willard*, 2 Mass. 124; *Thompson v. Whitman*, 18 Wall. 457; *Earle v. Mcveigh*, 91 U. S. 503; *Spoors v. Cowan*, 44 Ohio St. 497; *Laughlin v. Volegsong (Ohio)* 38 N. E. 111; *Pierce v. Bowers (Tenn.)*

8 Baxt. 353; Withers v. Patterson (Tex.) 86 Am. Dec. 643; Wade v. Hancock 76 Va. 621; Roberts v. Hickory etc., Co. (W. Va.) 41 S. E. 351; 15 Standard Proc. 415 et seq.; Roderigas v. East River Sav. Inst. 63 N. Y. 460; Wenzer v. Howland, 10 Wis. 8; Rogers v. Cady (Cal.) 38 Pac. 81; Peck v. School Dist. 21 Wis. 521; Mora v. Kuzac, 21 La. Ann. 754; Heinlin v. Heilbron, 30 Pac. 8.

When the statute prescribes some fact which must exist as a condition precedent to jurisdiction, such fact must exist before there can be jurisdiction. The board cannot arbitrarily adjudge the existence of such fact. *Ibid.*

It is the fact, and not the record evidence of the fact, which gives the jurisdiction. *Ibid.*

Any existing presumption that such boards have done their duty is a rebuttable presumption. *Chamberlayne, Ev.* ¶ 1202a; *Re Sheriff* (N. J.) 69 Atl. 305; *McLean v. Farmers Highline Canal, etc., Co.* (Colo.) 98 Pac. 16; *Western U. Tel. Co. v. Dodge County* (Neb.) 117 N. W. 468; *Hahn v. Kelly* (Cal.) 94 Am. Dec. 742; *Tompert v. Lithgow*, 1 Bush, 176; *Carron v. Martin* (N. J. L.) 69 Am. Dec. 584; 15 Standard Proc. 434, et seq.

Presumed jurisdiction only exists until the contrary is shown. *Ibid.*

*Certiorari* is not the proper remedy in this case, as the writ would have brought up only the record of defendant board. Complaint of many matters *de hors* the record is here made. *Comp. Laws*, § 8445; *Re Dance*, 2 N. D. 184; *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8; *Re Pedorena* (Cal.) 22 Pac. 71; *Haven v. County Comrs.* (Mass.) 29 N. E. 1083; *Hackett v. Brown* (Mich.) 87 N. W. 102; *People v. Feitner* (N. Y.) 66 N. E. 1114; *Lippincott v. Strout Co.* (Del.) 79 Atl. 215; *State v. Thorne* (Wis.) 87 N. W. 797; *State v. King* (La.) 23 So. 992; *Porter v. Steele* (Idaho) 63 Pac. 187; *Comrs. v. Smith* (Ill.) 75 N. E. 396; *Wheeler v. Probate Ct.* (R. I.) 49 Atl. 574; *Hatlestad v. Court* (Iowa) 114 N. W. 628; *Ward v. Board* (Mo.) 36 S. W. 648; *Alexander v. Archer* (Nev.) 24 Pac. 373; *Re Road in Bern & Penn Twp.* (Pa.) 17 Atl. 265; see also note in 40 Am. St. Rep. 30.

The record as returned imparts verity and is conclusive of all the facts stated therein. *Ibid.*

Under the facts admitted by the demurrer, the annexation proceedings were void, and *certiorari* will not issue in such cases. *Bass v.*

Milledgeville (Ga.) 50 S. E. 59; *Sawyer v. Blakely* (Ga.) 58 S. E. 399; *People v. Moore*, 1 N. Y. Supp. 405; *Dison v. Cincinnati*, 14 Ohio, 240; *State v. Chittenden* (Wis.) 107 N. W. 500; *Lutien v. Kewau-nee* (Wis.) 126 N. W. 662.

The statute fixes as a prerequisite to jurisdiction, that a petition signed by the required number of citizens and taxpayers of the territory, must be presented to the board. Appellants allege that no such petition was presented and therefore there was no jurisdiction. *West End v. State* (Ala.) 36 So. 423; *Borchard v. Ventura County* (Cal.) 77 Pac. 708; *People v. Stratton* (Colo.) 81 Pac. 245; *People v. Pike* (Ill.) 64 N. E. 393; *Atty-Genl. v. Rice* (Mich.) 31 N. W. 203; *Yard v. Ocean Beach* (N. J. L.) 5 Atl. 142; *State ex rel. Lee v. Jenkins* (Mo.) 25 Mo. App. 484; *Kaiser v. Lawrence* (Iowa) 8 N. W. 772; *McGarahan v. Mining Co.* 96 U. S. 316; *Page v. Board, etc.* (Cal.) 24 Pac. 607; *People v. Linden* (Cal.) 40 Pac. 115; *Re Taylorport* (Pa.) 13 Atl. 224; *Darmouth Sav. Bank v. School Dist.* 6 Dak. 332.

It is not essential to an allegation of fraud that the word "fraud" or "fraudulent" be used. The ultimate facts need only to be concisely set forth. Such is done here. *Whittlesey v. Delaney*, 73 N. Y. 571; *Hicks v. Stevens*, 11 N. E. 241; *Morgan v. Hayes*, 1 Ohio Dec. 454; *Lafayette Co. v. Neeley*, 21 Fed. 738; *Castle v. Bader*, 23 Cal. 75; *Hodgkins v. Dunham* (Cal.) 103 Pac. 351; *Sallies v. Johnson* (Conn.) 81 Atl. 975, Ann. Cas. 1913A, 386; *Parsons v. Barnes* (Neb.) 135 N. W. 374; *Benolkin v. Guthrie* (Wis.) 87 N. W. 466; *Warren v. Union Bank* (N. Y.) 51 N. E. 1036; *Parham v. Randolph* (Miss.) 4 How. 435, 35 Am. Dec. 403; *Andrews v. King County* (Wash.) 23 Pac. 409; see also note 90 Am. Dec. 277; *Indiana N. & T. Co. v. Glass Co.* 75 N. E. 649; *Railway Co. v. Stevens*, 96 N. E. 493; *Holcomb v. Noarman*, 91 N. E. 625; *Vukelis v. Virginia*, 119 N. W. 509; *Allen v. Coal Co.* 115 Pac. 673; *Silver Bow County v. Davies*, 107 Pac. 673; *Wallace v. Jones*, 74 N. E. 576; *Boelk v. Nolan*, 107 Pac. 689; *Trustees v. Hughes*, 172 Fed. 206; *Richardson v. El Paso Co.* 118 Pac. 982; *Soule v. Weatherby*, 118 Pac. 833; *Weber v. Lewis*, 126 N. W. 105; *White Bros. v. Watson*, 117 Pac. 497.

Notice of hearing must be published and posted as required by law else the board has no authority to make any order. *Trotter v. Paunley*, 39 Iowa, 203; *Butterfield v. Inhabitants, etc.*, 61 Me. 583; *Gentle v.*

School Inspectors (Mich.) 40 N. W. 928; Graves v. Joint School Directors (Mich.) 61 N. W. 70; Perryman v. Bethune (Mo.) 1 S. W. 231; State v. Compton (Neb.) 44 N. W. 660; People v. Hooper (N. Y.) 13 Hun. 639; Huysey v. Zeeland Twp., etc. (Mich.) 91 N. W. 1020; Noble v. White (Ky.) 77 S. W. 678; State ex rel. Ladd v. District Ct. 17 N. D. 285; Bartels Northern Oil Co. v. Jackman, 29 N. D. 236; High, Inj. § 1254; Jewett Bros. v. Smail (S. D.) 105 N. W. 738.

BIRDZELL, J. This is an appeal from an order entered in the district court of Ransom county, sustaining a demurrer to the complaint. The action was brought for the purpose of enjoining the defendants from asserting any jurisdiction over certain territory that had been annexed to the defendant school district, or from levying upon or carrying forward upon the books of the defendant district any taxes for the benefit of the district or certifying the same to the county auditor. Judgment was also asked against the school district for an amount paid in taxes during the year preceding the bringing of the action. The complaint alleges in substance that the plaintiffs are owners of property within the territory affected by the alleged annexation proceedings; that they bring the action on behalf of themselves and others similarly situated; that on the 25th day of June, 1915, the defendant school district, acting through its board of education, the members of which are made defendants, made a purported order annexing certain territory to the defendant district, part of which was originally embraced in the Tuller School District No. 19, and some of which was located more than 3 miles from the central school in the defendant district; that the annexation proceedings had were void for the reasons: (a) That the application therefor was not signed by the requisite number of qualified petitioners; (b) that the application was signed by some who were not residents or voters of the territory sought to be annexed; (c) that proper notice of hearing of the application was not given; (d) that, after the application was signed by all petitioners except two, it was altered by one of the individual defendants, a member of the defendant school board, by the addition of descriptions embracing additional territory; and (e) that there were forty-five resident school voters in the school territory added to the application, eleven of whom signed the application. The



complaint further alleges that, pursuant to the purported annexation proceedings, the property and funds of the districts affected thereby were equalized by a board of arbitration and that taxes were levied and assessed by the defendant upon the property so annexed. There are also allegations showing the inconvenience to which the plaintiffs are subjected by reason of the purported annexation proceedings and the extent to which they are prejudiced by additional taxes levied for the support of the defendant school district. Also that the defendant district has not, since the annexation proceedings, made any expenditures for additional buildings, teachers, etc., except such as would have been necessary in the absence of the attempted enlargement of the district.

As stated above, the proceedings complained of were shown by the complaint to have been had on or about the 25th day of June, 1915. This action was begun on the 7th day of April, 1916. A demurrer was served on April 12th and filed on the 5th day of December, 1917. The order sustaining the demurrer is dated on the 8th day of December, 1917.

The proceedings involved in the action were had under § 1240 of the Compiled Laws of 1913. This section provides that special school districts may annex adjacent territory "upon application in writing, signed by a majority of the voters of such adjacent territory, provided, that no territory shall be annexed which is at a greater distance than 3 miles from the central school in such special district, except upon petition signed by two thirds of the school voters residing in the territory which is at a greater distance than 3 miles from the central school in such special district." The section further provides for fourteen days' notice of a hearing to be published in the various newspapers and for notices to be posted in conspicuous places, three of such notices being required to be posted in the special district, three in the territory sought to be annexed, and three in the district remaining from which the territory is sought to be taken.

As above indicated, the plaintiff alleges noncompliance with the above statute in the failure of the petition to contain the requisite number of signatures of qualified petitioners and in the failure to give proper notice of the hearing. The complaint is therefore sufficient as against the demurrer if the proceedings are open to attack in

the manner attempted. The decisive question is, Can the proceedings be attacked in this action?

The complaint, fairly construed, alleges facts which, if proven, would establish that the defendants are illegally exercising jurisdiction over the territory sought to be annexed to the defendant district for school purposes. The respondent argues that the attack in question is collateral and that the plaintiffs are not entitled to the relief sought until there has first been a judicial review of the proceedings had by the officers of the district in a certiorari proceeding. We are of the opinion that certiorari as embodied in the Code provision of 1895, after the decision of this court is the case of *Re Evingson*, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733, would have afforded to the plaintiffs a remedy to secure a review of the proceedings had before the board of the defendant district. Provision is expressly made now (Rev. Codes 1895, § 6104, Comp. Laws 1913, § 8451) for the proof of any question of fact which is essential to the jurisdiction of the body or officers making the determination to be reviewed by certiorari. It is also now provided (Rev. Codes 1895, § 6107, Comp. Laws 1913, § 8454), that the record of the board may be impeached by the return or by the written proof authorized by the preceding section. But it does not follow that certiorari is the only proceeding in which the right of the defendants to exercise jurisdiction for school purposes over the territory in question can be attacked. It was competent at the common law to resort to proceedings in the nature of *quo warranto* for the purpose of determining the legality of the exercise of the corporate franchise of a municipal or quasi municipal corporation over territory sought to be included therein. This question was directly presented to the supreme court of Illinois in the case of *People ex rel. Huck v. Newberry*, 87 Ill. 41. That case involved, as does the case at bar, the legality of a proceeding to attach territory to an existing school district, and the supreme court held that *quo warranto* was as applicable to test the legality of the re-formation of a district as to test the validity of its original formation. The proceeding in that case was an application for a judgment for delinquent school taxes and the court held that the defendants could not inquire into the legality of the organization of the district except by *quo warranto*. The pertinent holding is: "The inquiry, whether it

affects the whole or only a part, is the same; and the policy which forbids inquiry as to the lawfulness of the organization of the district, except by a direct proceeding for that purpose, equally forbids inquiry as to the lawfulness of the organization of a part of the district except by a direct proceeding for that purpose." *People ex rel. Cooney v. Peoria*, 166 Ill. 517, 46 N. E. 1075; *State ex rel. Hammond v. Dimond*, 44 Neb. 154, 62 N. W. 498; *State ex rel. Loy v. Mote*, 48 Neb. 683, 67 N. W. 810. See also 32 Cyc. 1415. It is clear that quo warranto would constitute a direct attack upon the validity of the organization of the defendant district as affecting the territory in question. Section 7969 of the Compiled Laws of 1913 expressly substitutes a civil action in district court for the remedy formerly attainable by the writ of quo warranto, and proceedings by information in the nature of quo warranto. We are of the opinion that the action in question may be properly considered a civil action brought for the purpose of affording a remedy formerly attainable by such a writ. It follows from this that the complaint states a cause of action.

While laches is somewhat argued in the briefs, we do not consider that the question is properly here at this time, and we consequently refrain from expressing any opinion on this phase of the case.

For the foregoing reasons the order appealed from is reversed.

BRONSON, J., not having been a member of the court when the case was submitted, did not participate.

CHRISTIANSON, Ch. J. (dissenting). As I construe the complaint in this case, the action is one to enjoin the collection of taxes. The prayer for judgment is that defendants be enjoined from asserting jurisdiction over the annexed territory, and from levying taxes against property located therein; and, also, that plaintiffs and all others similarly situated have judgment against the defendant school district for the amounts paid for taxes levied during the year 1915. I do not, however, deem the character of the action of controlling importance. The action is brought by the plaintiffs as private persons. There is no averment that the attorney general was ever requested to institute or co-operate in bringing an action in the nature of quo warranto. There is nothing to show that anyone but the plaintiffs assail the an-

nexation order, or that they have authority to bring the action in behalf of others. One of the plaintiffs signed the petition for annexation. The school district from which the territory has been segregated is not a party, and has made no complaint. So far as the complaint shows the plaintiffs were fully informed of every alleged fact upon which they predicate their action on June 25th, 1916, and yet there is not the slightest excuse offered for their failure to seek review by certiorari, or to institute their action within a reasonable time, or to prosecute the same with some degree of diligence. The trial court did not dismiss the action, but merely sustained the demurrer and granted plaintiffs leave to serve an amended complaint. It seems to me that the trial court was justified in making this order, regardless of the nature of the action. See *Black v. Brinckley*, 54 Ark. 372, 15 S. W. 1030; *State ex rel. Walker v. McLean County*, 11 N. D. 356, 367, 92 N. W. 385; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818.

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**LOREN N. BUGBEE and Charles V. Green, Appellants, v. COUNTY OF STEELE et al., Respondents.**

(170 N. W. 321.)

**Primary election — removal of county seat — submitting question to voters — injunction to prevent — action for — petition in.**

1. In an action by plaintiff to perpetually enjoin and restrain defendants from taking any further proceedings in the matter of submitting to the electors of Steele county at the primary election to be held June 26th, 1918, the question of the removal of the county seat of Steele county, and from distributing ballots therefor, and canvassing returns from the votes at such primary election, such primary election for the removal of said county seat being held under and pursuant to the provisions of chapter 102 of the Session Laws of 1917, which relates only to the removal of that class of county seats not on a railroad or an interstate river, it is *held* the relief prayed for should not be granted and the application for perpetual injunction should be denied.

**Petition — form and substance — notice — primary election ballot — laws relating to — compliance with.**

2. The form and substance of the petition, notice, and ballot used in said primary election were a sufficient compliance with the requirements of chapter 102 of the Session Laws of 1917, and other laws adopted as a part thereof.

Opinion filed December 11, 1918.

Appeal from the District Court of Steele County, North Dakota, Honorable A. T. Cole, Judge.

Affirmed.

*George A. Bangs and George R. Robbins*, for appellants.

*P. O. Sathre and Engerud, Divet, Holt, & Frame*, for respondents.

GRACE, J. Appeal from the district court of Steele county, North Dakota, Honorable A. T. Cole, Judge.

The relief demanded in the complaint is to perpetually enjoin and restrain defendants from proceeding any further in the matter of submitting to the electors of Steele county at the primary election to be held June 26, 1918, the question of the removal of the county seat of Steele county and from distributing ballots therefor, or receiving or canvassing any returns from the votes cast at said election on said question, or declaring the result thereof, or from placing on the ballot for the general election November, 1918, the names of the towns receiving the highest votes for county seat at such primary election, or from taking any further steps to place before or submitting to the electors of Steele county the question of the removal or relocating of the county seat at the general election in November, 1918. The proceedings had with the object of removing the county seat of Steele county to some other place within the county were had under chapter 102 of the Session Laws of 1917, which chapter is applicable only to county seats not located on the railroad or interstate river. There are only three such county seats in this state, those of Dunn, McKenzie, and Steele counties. Sherbrooke is the county seat of Steele county. The law then applies only to this class of county seats of which there are but three. The case involves the correct interpretation of chapter 102 of the Session Laws of 1917.

The complaint, after alleging that the plaintiffs are taxpayers, and

then setting forth the names of the present duly elected, qualified, and acting board of county commissioners, and the name of the auditor and deputy auditor of the county, and the location of the county seat at Sherbrooke in said county for more than twenty years, sets forth the following petition, which was presented to the county commissioners on May 15, 1918:

"To The Honorable Board of County Commissioners in and for the County of Steele, State of North Dakota:

"We, the undersigned, qualified electors of the county of Steele, state of North Dakota, respectfully petition the honorable board of county commissioners of said Steele county, and pray that the county seat of said Steele county be removed from its present location at Sherbrooke to some other and more convenient place in said county, and to that end demand that the board of county commissioners of said Steele county order and cause to be submitted to the electors of said county at the next primary election to be held on the 26th day of June, 1918, the question of relocating the county seat of said county of Steele, and the designation of their choice of such location."

The complaint shows there were 874 legally qualified electors of the county, constituting more than three fifths of all the votes cast in the county at the last preceding election, and who verified by his affidavit the petition in the manner required by law. Upon the filing of the petition, the board of county commissioners adopted the following resolution:

"A petition having been presented to the board of county commissioners bearing 874 signatures, which petition is duly verified by the oath of subscribers thereto, setting forth that such subscribers are residents of Steele county, North Dakota, and qualified voters therein, and that each of said subscribers personally signed his name to said petition, having known the contents and purposes thereof, which petition prays for submission to the voters of said Steele county, at the next primary election to be held in June, 1918, of the proposition of removal of the county seat of said Steele county, from Sherbrooke, its present location, to some other and more convenient place in said Steele county; and said petition having signers, and the number of signatures thereto having been compared with the election returns of the last preceding general election in said county; and the commis-

sioners being satisfied that said petition is signed by qualified electors of said Steele county equal in number to more than three fifths of all the votes cast in said Steele county at the last preceding general election; and the commissioners being further satisfied that said petition is in due form as required by law; therefore

"Be it resolved, that the proposition of removal of the county seat of Steele county from Sherbrooke, its present location, to some other and more convenient place in said Steele county, be submitted to the voters thereof at the next primary election, to be held on June 26th, 1918, and that the auditor be instructed and directed to prepare ballots for said proposition, to be distributed to the several election precincts of said Steele county together with the primary election supplies for said primary election."

That thereafter and on May 20, 1918, the county auditor prepared notices of the primary election, to be held June 26th, 1918, and in said notices included, as part thereof, a notice that at said primary election, among other questions to be submitted to the electors, was the question of county seat removal; that the reference to the question in said notice was as follows:

### County Seat Removal.

The proposition of removing the county seat from Sherbrooke to some town on the railroad will be voted on at this election.

The notice was published in all the newspapers of the county, being, in number, four, and for five times, once each week in the regular edition of said newspaper during the four successive weeks between the 20th day of May, 1918, and the date of the primary election. The five copies of the said election notice to each voting precinct were delivered by the county auditor to each of the inspectors of election for each precinct in the county, which were posted in five public places in each precinct at least five days before election. One place of posting being at the regular polling place of each precinct. The ballot used in the election upon the question of county seat removal is as follows:

### County Seat Ballot.

On the proposition of removal of the county seat of Steele county from its present location at Sherbrooke to some other and more convenient place in said Steele county.

The voter will indicate his choice for county seat of Steele county by writing or posting the name of the place he prefers in the blank space. For location of the county seat of Steele county, at . . . []

Chapter 102, as far as material to this controversy, provides "that in counties where the county seat is not located on a railroad or interstate river, the question of county seat removal may be voted at any primary election, and if more than two towns are contending for the location of the county seat at such election, then the two towns receiving the highest vote at such primary election, and these two towns only, shall be placed on the official ballot at the first following general election, and the town then receiving the highest number of votes cast for the county seat location at such general election shall be designated the county seat of such county, and the county seat located thereat. . . .

"The provisions as to petition, notice, ballot, etc., provided by law for election for the removal of county seats shall be applicable to the primary election therein provided for, as well as the general elections."

Those provisions of law which are applicable to the general elections are made applicable to the primary election in counties where the county seat is not on the railroad or an interstate river, and where there are two or more candidates contending for the county seat. Those sections are 3233 to 3239 of the Compiled Laws of 1913, both inclusive. These are the sections and the law referred to in chapter 102, the provisions of which are to govern the petition, notice, ballot, etc., in voting upon the question at the primary election as to the removal of the county seat where the same is not located upon a railroad or interstate river. The legislature intended that chapter 102, as finally enacted into law, would be of the same force and effect as if there had been incorporated therein in their entirety §§ 3233 to 3239, both inclusive. The above sections referred to are applicable to the



petition, notice, and ballot, etc., involved in the instant case. The petition in the instant case corresponds with the requirements of 3233, the section describing the requirements of the petition. The petition in this case is legally correct and is a sufficient compliance with the requirement of said section. This is true, though the place to which removal is desired is not inserted in the petition. Said section does not specifically require the name of the place to which removal is to be made to be inserted. This petition closely follows the requirements of the section and is a sufficient and substantial compliance with the same. The majority of the court also feel that this construction in this case is not in conflict with the holding of this court in the case of *Miller v. Norton*, 22 N. D. 196, 132 N. W. 1080. The writer, however, believes that the holding in this case, with regard to the requirements of the petition, is in harmony with the plain words of our statute, § 3233, but that it is in conflict with the holding in the *Miller v. Norton* Case with reference to the necessity of naming the place or places in the petition to which the removal of the county seat is desired to be made. The petition also fulfils the requirements of § 3234 as to the number and qualifications of the petitioners. Notice of election in the instant case complies with the requirements of § 3235, which prescribes how notice of such election shall be given. The ballot in the instant case was so drawn that there was a blank space in which elector could write the name of the town which he preferred as the place to which the county seat should be removed, and he is required by law to place opposite the name written in the mark (X). The court is of the opinion that the ballot in such form was a sufficient compliance with the requirements of § 3236. The requirements of 3236 as to voting by the elector is as follows: "*In voting on the question, each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark (X).*" It would seem the ballot in this case, having a blank space in which the elector could write the name of the place in the county which he preferred as the place to which the county seat should be removed, is sufficient to afford such elector an opportunity of expressing his choice. He could write in the name of any town that he desired and it was his duty to mark the (X) after it.

The order of the trial court overruling the plaintiffs' demurrer to the answer is affirmed, with statutory costs on appeal.

ROBINSON, J. (concurring specially). This is a county seat case in which the plaintiff appeals from an order sustaining a demurrer to the answer. The case relates to an election for the location of the county seat of Steele county. The county is in the form of a square, consisting of sixteen congressional townships. The present county seat is at Sherbrooke, a village 2 miles south of the center of the county.

The two largest, most promising and most accessible towns in the county are Hope and Finley on the Great Northern Railway. Prior to the last general election three fifths of the voters filed with the county auditor a petition in due form to the county commissioners for the relocation of the county seat at some more convenient place. Thereupon the commissioners passed a resolution to submit the question to a vote at the primary election on June 26, 1918. Notice of election was duly advertised and every citizen of the county went to the polls and voted on the question. Finley received 938 votes, Hope received 744 votes, and Sherbrooke received 411 votes. Hope is on the south border of the county and at an equal distance from the east and the west lines. Finley is 5 miles west from the very center of the county.

As the answer shows, the whole procedure has been substantially in accord with the statute. There has been a fair vote and no one has been in any way deceived or misled, and under the statute, at the next general election, the voters of the county shall have an opportunity to choose between Hope and Finley.

Under the statute a petition for the removal or relocation of the county seat must be signed by the qualified electors of the county equal in number to at least three fifths of all the votes cast in the county at the last preceding general election. Comp. Laws, § 3234.

The notice of such election, clearly stating its object, must be given and the election must be held as prescribed by law in regard to the submitting of questions to the electors of a locality under the general election laws. Comp. Laws, § 3235.

And in counties where the county seat is not located on a railroad or interstate river, the question of county seat removal may be voted

on at any primary election, and if more than two towns are contending for the location of the county seat at such election, then the two towns receiving the highest vote at such primary election, and those two towns only, shall be placed on the official ballot at the first following election, and the town then receiving the highest number of votes cast for the county seat location at such general election shall be designated the county seat of such county. Laws 1917, chap. 102.

The answer set forth the petition which was signed by three fifths of the voters, the resolution of the commissioners for the submission of the same to a vote at the primary election in June, 1918, the publication of notice, the fact that the election was thoroughly advertised and discussed, and that every qualified person voted by ballot in due form, and the votes were counted as above stated for Finley, Hope, and Sherbrooke, and that on the county seat question, there were more votes cast than on any other question.

The demurrer is that the answer does not state facts sufficient to constitute a defense. It does not point out wherein the answer fails to state any material facts, but it does state facts sufficient to show a substantial compliance with the statute. If either pleading is subject to a general demurrer it is the complaint. It shows no equity, and together the complaint and answer do show a fair, honest, and substantial compliance with the statute.

Objection is made to the election notice, to some matters of form and the naming of the procedure. The answer to all the objections is that they are technical, have no equity and no bearing on the merits of the case. Nothing is more certain than that the voters of the little county have had a fair notice and a fair opportunity to express themselves, and they all went to the polls and voted for the place of their choice. Of course, the fewest number of votes were given for Sherbrooke, and so it would have been if there were a thousand elections, because it is manifestly no place for the county seat, and it is proper and right that the voters should have an opportunity to fix their county seat in a proper place and to choose between Hope and Finley.

The purpose of the statute is to give the people of a county a fair opportunity to go to the polls and vote for the location or relocation of their county seat when it is not on a river or a railroad, because it is a well-known fact that a county seat should be on some line of traffic

and commerce and readily accessible to the public. And it is not for this court to thwart the will of the voters and the purpose of the statute by any technical refinements.

Order should be affirmed.

BRUCE, Ch. J. (specially concurring). I concur in the above opinion, though not in its dicta. I am, of course, not prepared to take judicial notice that Sherbrooke is not a fit place for a county seat.

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LAWRENCE HENRY RANDOM, Respondent, v. ELIZA RANDOM, Appellant.

(170 N. W. 313.)

**Divorce—action for—grounds—extreme cruelty—bodily injury—mental suffering—care and custody of children.**

In an action brought by citizens and taxpayers residing within an area guilty of extreme cruelty by inflicting on the defendant grievous bodily injury and grievous mental suffering, so as to make it unsafe and improper for her to live with him as his wife. Hence, the marriage between the plaintiff and the defendant is dissolved. The care and the custody of the minor children is awarded to neither party to the exclusion of the other, but the plaintiff must pay for the care and keeping of the children.

Opinion filed November 29, 1918. Rehearing denied December 21, 1918.

Appeal from the District Court of Stutsman County, Honorable J. A. Coffey, Judge.

Reversed.

S. E. Ellsworth, for appellant.

"A bill for divorce, upon a charge of adultery, should not be filed upon general suspicion, nor until the discovery of some specific act

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NOTE.—The question as to whether making charges of adultery is ground for divorce is discussed in notes in 18 L.R.A.(N.S.) 300, and 34 L.R.A.(N.S.) 360. On drunkenness as affecting cruel and inhuman treatment in action for divorce, see note in 34 L.R.A. 454.

On denial of custody of child to parent for its well-being, see note in 41 L.R.A.(N.S.) 564.

or of the facts from which such act must be inferred, and these must be sufficiently stated to identify the act upon which the suit is founded." *Freeman v. Freeman*, 31 Wis. 235.

"Neither party has the right to make such a charge against the other on mere suspicions, relying upon being able to fish up testimony before the trial to support the allegation." Nelson, Div. & Sep. §§ 138, 179; *Wood v. Wood*, 2 Paige, 108; 14 Cyc. 694.

"While no absolute rule can be laid down as to the facts and circumstances from which adultery will be inferred, yet, in general, proof of opportunity or the facility of access of the parties charged, will be insufficient unless accompanied by some proof of the existence of an adulterous disposition in such parties." Nelson, Div. & Sep. § 144; *Freeman v. Freeman* (Wis.) 235.

The defendant in a divorce suit may recriminate by a showing of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce. Comp. Laws 1913, § 4393.

Condonation may also be shown as a complete defense to any cause for divorce. Comp. Laws 1913, §§ 4390, 4391.

*Knauf & Knauf*, for respondent.

"Ordinarily the offense of adultery must be established by circumstantial evidence. It is not necessary to prove the carnal act by direct evidence, for it is seldom that such proof is obtainable. The crime is one where the guilty parties, acting in union, take every precaution to prevent discovery. Such being the rule of human nature, it may safely be said that concealment of the opportunity is always inconsistent with innocence. Nelson, Div. & Sep. p. 188.

Here the chancellor had the witnesses before him; he noted their conduct, their demeanor and actions in court, and observed the circumstances under which they were while in court, and indeed was capable of arriving at and pronouncing a correct judgment, and his findings, having full support in the evidence, should be sustained. *Freeman v. Freeman*, 31 Wis. 235.

"In determining the party in whose custody a child shall be placed after a divorce, the leading and paramount consideration is the interest and welfare of the child." 14 Cyc. 805; *Re Pryce*, 41 L.R.A. (N.S.) 564 and cases cited.

ROBINSON, J. This is an appeal from a judgment awarding the plaintiff a divorce, the custody of three minor children, and the costs of the action. The amended complaint charges that at divers times and places the defendant committed adultery with divers persons. This the defendant denies, and by a cross complaint she avers that for years the plaintiff has been guilty of extreme cruelty by drinking liquor to excess, by slandering her, calling her foul names, addressing to her violent language, threatening, assaulting, beating, and striking her. She avers that his general conduct toward her has been harsh, coarse, and insanely jealous. She also avers that at Jamestown in March, 1917, and other times, the plaintiff committed adultery with a certain person, his housekeeper. Hence, she prays for a decree of divorce and the custody of the minor children. By statute a divorce may be granted for adultery and for extreme cruelty.

Aside from the care and companionship of the children, the case is of no great importance because the plaintiff has no means, only a salary of \$135 a month, and, hence, he cannot be forced to support the defendant. The judgment is that the marriage be dissolved and that each of the parties be dissolved from all the obligations of the marriage, and that after ninety days each party may marry again. And thus far it is clearly right regardless of any cause assigned for it. The divorce is really given to one party as much as to the other, and that is right. The real question is in regard to the costs and alimony and the care and companionship of the children. The defendant has given the plaintiff a dozen years of her best life and services, for which she should have some reasonable compensation. This the court cannot assure to her because the plaintiff has no property. However, it would be a gross wrong to turn her off without a penny and to burden her with the costs of the suit. The court was wrong in awarding to the plaintiff the sole charge and custody and control of the minor children and in making no provision for the mother to have at reasonable times the care and companionship of the children. It is not for a court to rend the most sacred ties of nature which bind the mother to her children, except in extreme cases.

On the question of adultery it can avail nothing to quote the voluminous testimony. The evidence against defendant is not nearly so cogent as the evidence connecting the plaintiff with his housekeep-

er. The testimony given by the plaintiff's brother is wholly incredible; it is a gross reflection on the plaintiff, and it throws discredit on his case. There is nothing in the testimony to lead to the conclusion that defendant was guilty of adultery.

On the question of cruelty the evidence is strongly against the plaintiff. He led the defendant a humdrum and dreary life, a merely animal existence, frequently scolding, beating, and abusing her. He was as insanely jealous as the husbands of the Merry Wives of Windsor, and like them he could not understand the feminine necessity for a change of scene and lively diversion to break the monotony of life. Hence, he became insanely jealous whenever defendant went out with a vivacious neighbor lady, who was in fact a grandmother. Thus, it appears that on one evening, at the request of Mrs. Siebold, the vivacious lady, the defendant accompanied her to the office rooms of one Jorgenson, where she went to induce him to become a member of a lodge. The two women went openly to his office, and soon the plaintiff followed them with a policeman, and in a rage of jealousy burst into the room. It was about 8 o'clock on March 12, 1915. The defendant did not know Jorgenson and had never met him. When she got home Random was there, and he called her vile names and said she had better get out. Things went on from bad to worse until January 26, 1917, when the plaintiff took the children to the home of his parents, saying to defendant that if on his return he found her in the house that he would beat her black and blue until she would not be able to get away. That was the end of their matrimonial life. When he got home she was not there. She did not care to submit to any more beating, and in that she was right. She had submitted too long.

The evidence does show that the plaintiff has been guilty of extreme cruelty as charged in the answer and that should be assigned as the cause of the divorce, and in any event the plaintiff should pay the cost of the suit, and the support and education of the children, and their companionship and company should be alike free to both the parents at all reasonable times.

Let judgment be entered to the effect that the plaintiff has been guilty of extreme cruelty by inflicting on the defendant grievous bodily injury and grievous mental suffering, so as to make it unsafe and

improper for her to live with him as his wife; and for that reason, the marriage between the plaintiff and the defendant should be, and it is, dissolved, and both parties freed and discharged from all the obligations of the marriage, excepting the care of the children; and that either party may marry again. That neither party shall have the care and custody of the children to the exclusion of the other. And until further ordered by the court, the care and custody and education of the children shall remain the same as it has been for the past several months, and the plaintiff must pay the necessary expense of the care and keeping and education of the children. And that the defendant do have and recover from the plaintiff the costs of this action and the costs of the appeal. Let judgment be entered accordingly.

BRUCE, Ch. J. (concurring in part and dissenting in part). I am of the belief that the judgment of the district court should be affirmed with the modification suggested by the opinion as to the care and custody of the children.

CHRISTIANSON, J., concurs.

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THE COUNTY OF STUTSMAN, a Public Corporation, Respondent, v DANA WRIGHT, as Sheriff of Stutsman County, State of North Dakota, Appellant.

(170 N. W. 326.)

**Sheriffs — fees of — turned into treasury — statutes — real estate mortgage foreclosure by advertisement — fees for collecting personal property taxes — fees.**

Under chapter 275, Laws 1911, relating to salaries of sheriffs and providing for fees collected by sheriffs to be turned into the county treasurer it is held:

1. That a sheriff is required to turn over to the county treasurer (a) all fees collected in making real estate mortgage foreclosure sales by advertisement; and (b) all fees received under § 2178, Compiled Laws 1913, for collecting personal property taxes.



**Chattel mortgages — foreclosure of — by advertising — fees in same — sheriffs may retain same.**

2. That a sheriff is not required to turn over to the county treasurer, fees received for making sales upon the foreclosure of chattel mortgages by advertisement.

Opinion filed November 29, 1918. Rehearing denied December 21, 1918.

Appeal from a judgment of the District Court of Stutsman County, North Dakota, *Coffey, J.*

Defendant appeals.

Modified and affirmed.

*John W. Carr*, for respondent.

The fees collected by a sheriff in all actions or proceedings wherein he acts in his official capacity and as required to do by law must be by him turned into the county treasury, and he must report to the county commissioners all fees collected. Comp. Laws 1913, § 8081.

The legislative intent must be clear, and the statute must evidence a plain intent to grant public funds to a public officer occupying a salaried office, otherwise the fund remains the property of the state. *State v. Stockwell*, 134 N. W. 767.

While the office of sheriff is a constitutional office, the Constitution also provides that the legislature shall fix or prescribe the duties and compensation of all county, township, and district officers. N. D. Const. § 173, Comp. Laws 1913, § 3520.

*Knauf & Knauf*, for appellant.

The fees collected by a sheriff in performing his duties as such may be kept and retained by him, excepting that all fees collected in the course of civil actions shall be by him turned over to the county treasurer, and he shall make a report to the board of county commissioners of all such fees collected and covered into the treasury. Sess. Laws 1911, § 6, p. 499; Rev. Codes 1905, § 2600; Comp. Laws 1913, § 3525.

A civil action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement of protection of some right, the redress or prevention of some wrong. Comp. Laws 1913, § 7330.

There is no action, unless it be "an ordinary proceeding in a court

of justice." The fees collected in foreclosures by advertisement and in the collection of personal taxes are not fees collected in an action in "an ordinary proceeding in a court of justice." 57 N. Y. 413-414.

We cannot say that the statute intervenes public policy, because the legislature can announce its own public policy. 151 N. W. 881-882; 23 Am. & Eng. Enc. Law, 155; Comp. Laws 1913, § 3526.

CHRISTIANSON, J. This case involves the construction of chapter 275 of the Laws of 1911. Comp. Laws 1913, § 3520. The law, as enacted, was entitled: "An Act Providing for Salary for Sheriffs and Providing for Fees Collected by Sheriffs to be Turned in to the County Treasurer of Their Respective Counties, and Prescribing for a Penalty for Failing to do so." The statute, in accordance with its title, prescribes the salaries to be paid to the sheriffs of the state. The second section of the act provides that "in addition to the salary prescribed by the preceding section, the sheriff or his deputy or deputies shall be allowed 10 cents per mile for each and every mile actually and necessarily traveled in the performance of any of their official duties." Comp. Laws 1913, § 3521. The following section (§ 3522, Comp. Laws 1913) provides that the sheriff or his deputy or deputies shall be reimbursed for livery hire used in the performance of his official duties, not exceeding a maximum amount specified. The statute also provides for the appointment of deputies who are to be paid stipulated salaries by the county. Prior to the enactment of this law, the sheriff's office was a fee office, and the sheriffs of this state received no salaries. In the instant case three questions are presented: (1) Is a sheriff, under this law, required to pay in to the county treasurer fees collected in making real estate mortgage foreclosure sales by advertisement? (2) Is he required to pay over to the county treasurer, the \$1 fee allowed by § 2178, Comp. Laws 1913, for making collection of personal property taxes? (3) Is he required to turn over to the county treasurer fees collected by him in the making of chattel mortgage foreclosure sales by advertisement? (No question is raised with respect to sheriff's fees on the foreclosure of real or chattel mortgages by action, but merely as to such fees in cases where they are foreclosed by advertisement.)

In our opinion the sheriff is required to pay over to the county all

fees collected by him in making real estate foreclosure sales by advertisement, and also the fees collected by him under the provisions of § 2178, supra, and in collecting personal property taxes.

It is part of the duties of a sheriff to make foreclosure sales of real estate mortgages by advertisement. Comp. Laws 1913, § 8081. It is also the duty of the sheriff to make collection of the personal property taxes. Section 2178, supra. The fees received by a sheriff upon foreclosure of real estate mortgages by advertisement and in collecting personal property taxes are fees which he receives and is required to collect in the performance of his official duties. In our opinion, chapter 275, Laws 1911, construed as a whole, evidences an intention on the part of the legislature to require the sheriffs of this state to turn the fees in question over to the county treasurers of their respective counties.

We do not believe, however, that the sheriff is required to account for or to pay over any fees which he may have received upon the foreclosure of chattel mortgages by advertisement. It is no part of a sheriff's duty to make foreclosure sales of chattel mortgages by advertisement. Under the provisions of the statute, such sales may be made by the owner of the mortgage or his agent or attorney. Comp. Laws 1913, § 8126. Manifestly, a sheriff who makes such foreclosure does not act in his official capacity as a sheriff. Surely there would be no liability upon his official bond for any neglect of duty in connection with the sale or failure to account for the proceeds. In making such sale, the sheriff acts as an individual. He does not act in his official capacity, and there seems to be no more reason why he should be required to account for what he receives in making such sales than to require him to account for moneys received by him for performing any other service which he performs in an individual capacity. Upon the record before us, it is impossible to say what amount of the moneys involved in this litigation are fees for the foreclosure of chattel mortgages by advertisement. Hence, it will be necessary to remand the cause in order that this may be done in the court below.

It should be noted that what we have said relative to chattel foreclosure sales has reference only to chattel foreclosure sales by advertisement and not to foreclosure of chattel mortgages by action. Where such mortgages are foreclosed by action and sale made upon execution,

the sheriff, of course, acts in his official capacity and is required to account for the fees received.

In order to obviate any possible misunderstanding, we deem it proper to say that this case in no manner involves any shortage upon the part of the defendant sheriff. It is undisputed that the moneys in controversy have been kept separate and available for such disposition as the court may order. And it is conceded that no blame or censure of any kind whatever attaches to the defendant in connection with the matters involved in this litigation, but that his conduct has, in every respect, been above suspicion.

It follows from what has been said that the judgment in this case should be modified by allowing the defendant to retain the fees received by him upon the foreclosure of chattel mortgages by advertisement, and, as so modified, the judgment should be affirmed. The case is therefore remanded with directions that judgment be entered in accordance with the views expressed in this opinion. Neither party will recover costs on this appeal.

ROBINSON, J. (concurring in part and in part dissenting). This is an appeal from a judgment for \$2,867.24 against the sheriff of Stutsman county on account of fees which he received on the foreclosure of real estate mortgages and the collection of personal property taxes. The sheriff claimed the right to hold the same in addition to his mileage and livery and a salary of \$200 a month. The claim is in effect that the Salary Act gives the sheriff a monthly bonus named a salary and permits him to receive and retain all fees as allowed before the passage of the act.

The Salary Act of 1911 is entitled: "An Act Providing for Salary for Sheriff and Providing for Fees Collected by Sheriffs to be Turned in to the County Treasurer of their Respective Counties and Prescribing for a Penalty for Failing to do so." [Chap. 275.] As the title shows, the original purpose of this act was to give the sheriff a good, fair, liberal salary for all services and to require him to turn into the county treasury all fees without any exception. But the sheriffs were so clever they secured an amendment permitting them to retain 10 cents a mile for every mile traveled, with livery or automobile hire at \$5 a day and 40 miles, or any part in excess of 20 miles,

to be reckoned as a day's drive, and 20 miles or less to be reckoned as a half day's drive. So when a sheriff drives half a mile he may charge and does charge \$2.50.

Under the present system of travel 10 cents a mile is good pay for a sheriff without any additional fees or salary. In a recent case in Morton county, for the work of one day in summoning a special jury the fees were: Mileage \$55.80, livery \$70. (*Froelich v. Northern P. R. Co.* — N. D. —, 167 N. W. 369.) Under the fee system as it was, and as it still remains, the sheriffs do make excessive and extortionate charges on nearly every turn. The temptation is too great. If the monthly salary allowed each sheriff and deputy is not enough, the duty of the legislature is to increase it and to strike out the nefarious mileage and livery so as to leave not a vestige of the abused and extortionate fee system.

By the Salary Act of 1915, chapter 112, all county officers are given a salary in lieu of fees, and it is provided: "All moneys received as fees of every nature, kind or description in his official capacity, or commissions and compensation for services on boards created by law, excepting mileage and livery, shall be paid by the sheriff at the end of each month into the general fund of the county."

Manifestly, the purpose of each act is to require a sheriff to pay into the county treasury every cent that he may receive as fees, excepting the mileage and livery. As there was no dispute concerning the fees received by the sheriff and not paid into the county treasury the judgment of the district is clearly right and should be affirmed.

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**GEORGE W. FRAINE, Appellant, v. NORTH DAKOTA GRAIN  
& LAND COMPANY, a Corporation, Respondent.**

(170 N. W. 307.)

**Cropping contract—owner of land to have half—cropper to have half—  
usual form—title—rights of parties.**

Under the usual cropping contract, when the landowner is to have a share of the crop and the tenant or cropper a share, each party has at all times

title to his share, and neither party has any right to sell or dispose of the share of the other party.

Opinion filed November 29, 1918. Rehearing denied December 21, 1918.

Appeal from the District Court of Pierce County, Honorable A. G. Burr, Judge.

Plaintiff appeals.

Reversed and remanded.

*Harold B. Nelson*, for appellant.

A principal is liable for an act of conversion committed by his agent while proceeding within the scope of his authority. 38 Cyc. 2056; *Farmers, etc. Bank v. Wood*, 143 Iowa, 635; 118 N. W. 282; 120 N. W. 625; *Feury v. McCormick, etc. Co.* 6 S. D. 396; 61 N. W. 162; 31 Cyc. 1582, and cases cited in note 22; 8 N. D. 103; *Comp. Laws* 1913, § 5866.

A principal is also civilly liable to third persons for a tort committed by his agent while acting within the scope, real or apparent, of his employment, such as conversion and fraud. *Ibid.*

After accepting the benefits of a transaction a party will not be permitted to repudiate the transaction. He is estopped to claim both property and its fruits. *Ibid.*

The defendant, through its agent, received the proceeds of the sale of grain, grown on land in which it had no interest. It retains the money, knowing of the mistake made in selling grain from "the wrong piece of land" and it seeks to repudiate liability by claiming that the person who acted for it, who obtained for and turned over to it, the very money in dispute, was not its agent. 31 Cyc. 1582; *Wycoff v. Johnson*, 48 N. W. 837; *Trust Co. v. Phillis*, 63 N. W. 903.

The plaintiff had good title to the grain converted. He was the real owner of the property, and the controversy is between him and a wrongdoer, and not between two persons equally innocent. There was no relation of landlord and tenant even. *Jones, Land. & T.* §§ 47, 48; *Curry v. Davis*, 1 Houst. (Del.) 598; *Guest v. Opdyke*, 31 N. J. L. 552; *Grey v. Reynolds*, 67 N. J. L. 169, 50 Atl. 670.

The naked right to enter upon a field to raise crops on shares, the owner remaining in general possession of the farm, does not amount

to a lease of the land. The parties under such circumstances are tenants in common of the crops. Jones Land. & T. § 51; Warber v. Hoisington, 42 Vt. 94; Elstad v. Elevator Co. 6 N. D. 88; Stebbins v. Demarest, 101 N. W. 528; Moore v. Lien, 91 Pac. 910; Abernathy v. Uhlman, 93 Pac. 936; Bank v. Rodgers, 103 Pac. 582; Dodson v. Covery, 105 Pac. 519; Fountain v. Fountain, 66 S. E. 1020; Fuhrman v. Interior, etc. 116 Pac. 666; Niagara Oil Co. v. Ogle, 96 N. E. 60; Mason v. Ward, 166 S. W. 466; Wheeler v. Sanitary Dist. etc. 110 N. E. 605.

The owner of the land, in the absence of express words indicating a different intention, is impliedly the owner of an interest in the crops which he may take and sell, without the consent of the cropper or party working the land. Smythe v. Tankersly, 56 Am. Dec. 193; Denton v. Stickland, 48 N. C. 61; Monerick v. Lewis, 3 McCord, 211; Messinger v. Union, etc. 65 Pac. 808; Neilson v. Slade, 49 Ala. 253; Rohrer v. Babcock, 58 Pac. 537.

*Richard E. Wenzel*, for respondent.

"There is absolutely no evidence whatever showing that Wenzel had been in any way deputized or authorized to represent the defendant in the matter of renting any of its lands."

It was the custom of Fraine's tenant Lindseth, to sell the crops and to pay Fraine by personal check on his own account, the amount due from him for each year. Ellis v. Nelson, 36 N. D. 300; Mpls. Iron Store Co. v. Branum, 36 N. D. 355.

ROBINSON, J. In 1916, the plaintiff was the owner of part of section 5-154-72. Under contract with plaintiff, Andrew Lindseth, or Lindseth Brothers farmed the land, sowed, harvested and threshed a crop of barley amounting to 396 bushels. Lindseth was to furnish the seed grain and to have all of the hay and each party was to pay for half of the twine bill and to have an equal share in the crop. After threshing Lindseth hauled the barley to the grain elevator. Then, on August 30, 1916, R. W. Wenzel, the attorney and agent of defendant, claimed half the barley and in his presence it was sold to the elevator company and its check was given to Lindseth Brothers, and they made their check to Wenzel for the gross price of half the grain, \$129. On that check payment was stopped because, by inadvertence,

no allowance had been made for twine, threshing and hauling. On September 6, 1916, Lindseth Brothers made to R. E. Wenzel, a check in lieu of the first for \$127.54, out of which there was paid for the threshing, twine, and hauling \$21.14, and the balance, \$106.40, Wenzel remitted to his clients, the defendants, and they received and retained the same. They claim that they are not liable in this suit, because it is not in the form of an action for money had and received.

Under the Code there is but one form of action which is named a civil action. All forms of pleading are abolished. The first pleading on the part of the plaintiff is the complaint which should contain a plain and concise statement of the facts constituting a cause of action. As the facts may not all be known, at the time of commencing an action, and as parties are not all skilful in making a proper statement of facts, the courts may permit pleadings to be amended before and after judgment and during the trial and may disregard errors and defects. In this case, the plaintiff might well have moved to amend his complaint to conform to the evidence and show that defendant had been a party to the sale of the grain and had on September 6, 1916, received from the sale the net proceeds, being \$106.40. But the defendants were not in any way misled by the form of the complaint; they and their attorney, Wenzel, knew that they had received the money and had no right to retain it. Under date of October 24, Wenzel wrote George W. Fraine, saying: "Through mistake the North Dakota Grain & Land Company obtained the landlord's share of the crop on your 120 acres in section 5-154-72 instead of the 160 in section 7, 154-72."

The defense made is not to the credit of either the defendants or their attorney. It comes too near the line of pettifoggery. Counsel for defendant knew to a cent the precise net amount defendant had received from plaintiff's share of the crop, and still he advised them to stand the risk of a suit and a judgment when he should have advised them to refund the money.

And the court fell into the error of holding that under a cropping contract, when the landowner is to deliver half the crop, then until delivery he holds title to all the crop; and when the tenant is to deliver half the crop, then until delivery, he holds title to all the crop; and that either party having title may sell all the crop and let the other



party whistle for his share. Clearly that is not law. On the contrary, as this court has held, under the regular cropping contract, each party has title to his share of the crop from the time it is sown until it is harvested, threshed, and sold. And he may at any time sell or mortgage his share of the crop subject, of course, to any just liens. *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543.

The case is entirely clear; it admits of no doubt; the plaintiff is entitled to recover from defendant \$106.40 interest at 6 per cent from September 6, 1916, and the costs of both courts. Let the judgment be entered accordingly.

Reversed and remanded.

CHRISTIANSON, J. (concurring). I concur in the conclusion reached by Mr. Justice Robinson. I am not prepared, however, to concur in what is said by him *arguendo* in his opinion, and I disapprove of his censure of defendant's counsel.

BRUCE, Ch. J. I concur.

BIRDZELL, J. I concur in the result, but in view of the theory upon which the case was brought and tried below, and of the views of the trial judge, it is not too much to say that the remarks concerning counsel are wholly uncalled for.

GRACE, J. I concur.

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GUST KOOFOS, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, a Foreign Corporation, Appellant.

(170 N. W. 859.)

**Interstate railway carrier—employee of—removing snow from track—over which interstate trains run regularly—engaged in interstate commerce—injured while working—Employer's Liability Act.**

1. An employee of an interstate railway carrier, who is injured while remov-

ing snow from a track over which interstate trains are being run regularly, is engaged in interstate commerce within the meaning of the Employer's Liability Act of Congress of April 22, 1908.

**Federal Employer's Liability Act—doctrine of contributory negligence—abolished by—comparative negligence—rule of—adopted.**

2. The Federal Employer's Liability Act abolished the doctrine of contributory negligence as a bar to recovery, and established the doctrine of comparative negligence.

**Employee—guilty of contributory negligence—injuries sustained—damages recoverable—how measured.**

3. Under the Federal Employer's Liability Act, the damages recoverable by an employee guilty of contributory negligence bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both."

**Causal negligence—attributable in part to employer—contributory negligence will not defeat recovery—lessee's damages allowable—employer's act—no part of causation—employer freed from liability.**

4. Where the causal negligence is partly attributable to the employer, the contributory negligence of the employee will not defeat recovery, but only lessen the damages. It is only when the employee's act is the sole cause,—when the employer's act is no part of the causation,—that the employer is free from liability under the Federal Employer's Liability Act.

**Employer—peril—known to—failure to remove it—negligence even though known also by employee—when assurance given that perilous conditions will be corrected.**

5. It is negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so.

**Known peril—assurance of its removal—by master—reliance thereon—by servant—continuing work—assumption of risk—does not follow.**

6. A servant who refrains from abandoning certain work on the assurances of his master that he will remove a known peril cannot ordinarily be said to have assumed the risk of injury from such peril.

Opinion filed December 21, 1918.

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NOTE.—As to the constitutionality, application, and effect of the Federal Employers' Liability Act, see the exhaustive annotations in 47 L.R.A.(N.S.) 38, and L.R.A. 1915C, 47.

As to whether track repairing and work in connection therewith as furthering interstate commerce is within the Federal Employers' Liability Act, see notes in 47 L.R.A.(N.S.) 55; L.R.A.1915C, 62, and L.R.A.1918E, 859.

41 N. D.—12.

Appeal from the District Court of Ward County, *Leighton, J.*

Defendant appeals from a judgment and from an order denying its alternative motion for a judgment notwithstanding the verdict or for a new trial.

Affirmed.

*Murphy & Toner*, for appellant.

Improper statements made by section boss to an employee, and calling him vile and approbrious names, was not within the scope of the employment of such section boss, nor in the furtherance of his master's business. It would clearly indicate a personal animus on the part of the section boss, and amount to a wilful wrong and injury against plaintiff, and the master is not liable. *Galehouse v. Soo Ry. Co.* 22 N. D. 615; *Kinnonen v. Great Northern Ry. Co.* 34 N. D. 556.

The case is lacking in proof that the defendant was running interstate trains over said line at the time plaintiff was shoveling snow on one of its tracks. 29 Cyc. 507-510.

If plaintiff's theory is correct, then the foreman committed an independent tort against him, and, if this be true, the foreman was acting outside the scope of his employment, because there is no proof that defendant authorized the foreman to deprive the plaintiff of his free agency, and the burden in this respect was upon plaintiff. *Bradshaw v. Louisville R. Co.* 14 Ky. L. Rep. 688, 21 S. W. 346; *Labatt, Mast. & S.* § 438; *Ferren v. Old Colony R. Co.* 143 Mass. 197, 9 N. E. 608, 15 Am. Neg. Cas. 481; *Kean v. Detroit, C. & R. Mills*, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 9 N. E. 728; *Showalter v. Fairbanks M. & Co.* 88 Wis. 376, 60 N. W. 257; *Burlington R. Co. v. Liehe*, 17 Colo. 290, 29 Pac. 175.

Where the danger is apparent, plain and obvious, and under no circumstances can be said to be hidden or concealed, the employee continuing the work assumes the risk. 20 Cyc. 1177; *Reardon v. State*, 4 Tex. App. 602; *Easterly v. VanSlyke*, 21 Neb. 611, 33 N. W. 209; *Love v. Wyatt*, 19 Tex. 312; *Cressy v. Postville*, 59 Iowa, 62, 12 N. W. 757; *Thormegan v. King*, 111 U. S. 549; *Loving v. Dixon*, 56 Tex. 75; *Lindley v. Sullivan*, 133 Ind. 588; *Razoo v. Varmi*, 81 Colo. 289; *R. Co. v. Peavey*, 29 Kan. 169.

All statutes similar to that upon which reliance is here placed are

construed and considered merely as establishing rules of evidence or of procedure, and not as abrogating the defense of contributory negligence. *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82; *Hall v. West Jersey & S. R. Co.* 244 Fed. 104; *Schumacher v. Central R. Co. (N. J. L.)* 89 Atl. 517.

*McGee & Goss* and *E. R. Sinkler*, for respondent.

Where the foreman of a railroad company gives to an employee an order and direction, which of course must be obeyed and followed by the employee, and such order and direction in its execution result in injury to the employee, the company is liable, because the foreman is working within the scope of his employment and authority. *Galehouse v. Soo Line*, 22 N. D. 615.

Plaintiff was engaged in interstate commerce when injured. *Lombard v. Boston & M. R. R. Co.* 223 Fed. 427; *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 59 L. ed. 1125; *Hein v. G. N. R. Co.* 34 N. D. 440; *United States v. St. Louis, I. M. & S. R. Co.* 154 Fed. 515; *United States v. Chicago & N. W. R. Co.* 157 Fed. 616; *North Carolina R. Co. v. Zackary*, 232 U. S. 248, 58 L. ed. 591; *Johnson v. Southern Pac.* 196 U. S. 1, 49 L. ed. 363; *Schlemmer v. Buf. R. & P. Co.* 205 U. S. 1, 51 L. ed. 681; *Ann. Cas.* 1914C, 167; *Fish v. Chicago, R. I. & P. R. Co.* 263 Mo 106, 172 S. W. 340; *Hyatt v. Hannabel & St. J. R. Co.* 19 Mo. App. 287, 70 L.R.A. 926.

Where a servant is engaged in work and is exposed to a danger and peril known to him and of the existence of which the master also has knowledge, but gives assurance to the servant that such peril will be removed, and the servant, relying upon such assurance, continues his labors, he cannot be said to have assumed the risk. *Fish v. Chicago, R. I. & P. R. Co.* 263 Mo. 106, 172 S. W. 340; *Hyatt v. Hannabel & St. J. R. Co.* 19 Mo. App. 287, 70 L.R.A. 926; *Schumaker v. St. P. & D. R. Co.* 46 Minn. 39, 12 L.R.A. 257, 48 N. W. 559.

It is immaterial here whether plaintiff was engaged in interstate or intrastate commerce.

The law of the case is identical under the Federal Statute and our state law. Federal Employers' Liability Act, 35 Stat. at L. 65, Fed. Stat. Anno. 1909, Supp. 584; Employers' Liability Stat. Laws 1915, chap. 207; *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520; *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. ed.

1018, 9 N. C. C. A. 452; Ely v. C. G. W. R. Co. 166 N. W. 740; Troxell v. Del. R. Co. 185 Fed. 540; Galveston R. Co. v. Averill (Tex.) 136 S. W. 98.

CHRISTIANSON, Ch. J. This is an action for personal injuries brought under the Federal Employer's Liability Act. The case was tried to a jury which returned a verdict in favor of the plaintiff for \$2,295. Judgment was entered pursuant to the verdict and the defendant appeals from the judgment and the order denying its motion in the alternative for judgment notwithstanding the verdict or for a new trial.

The evidence showed that the plaintiff, who at that time was twenty-three years of age, went to work for the defendant Railway Company about January 19th, 1916, as a member of an extra gang employed in shovelling snow and fixing snow fences on the defendant's railroad in Montana. On Sunday, February 7th, 1916, the extra gang was at Scobey, Montana. On the evening of that day, the foreman requested plaintiff and the other members of the crew to go out and clean the snow out of some cuts between Scobey and Flaxville. While there is some conflict as to the exact degree, it is undisputed that the weather was very cold. The plaintiff testified that the thermometer registered more than 40° below zero, and that there was a blizzard. According to plaintiff's testimony he objected to going out to work that evening owing to the existing weather conditions, whereupon he was assured by the foreman that a warm passenger coach would be taken along in which the workmen could ride to and from work and to which they could retire and warm themselves, if it became necessary, while they were working; also, that fires would be built along the track; that they would go out only a distance of 2 or 3 miles and would be gone only about two or three hours. The plaintiff testified that he thereupon dressed for work by putting on the same amount and kind of clothing which he had been wearing while engaged in performing similar work for the defendant that winter, and that he started a fire in the heater in the coach connected with the engine. As they were about to start, the foreman informed the plaintiff and other members of the crew that it was unnecessary to take the coach as they were only going a distance of 2 or 3 miles and would be gone only two or three hours; that the plain-

tiff and the other members of the crew thereupon in accordance with the directions of the foreman climbed upon the tender of the engine and that they rode there in traveling to their work. They left Scobey about eight or eight thirty in the evening, but instead of going a distance of only 2 or 3 miles and returning in two or three hours, they continued to move from cut to cut for a distance of from 10 to 12 miles, and did not return to Scobey until about, or after, five o'clock the following morning. No fires were built along the track. The plaintiff and the other members of the crew from time to time went into the engine cab and warmed themselves. The plaintiff testified that some time after midnight he endeavored to go into the cab for the purpose of warming himself and informed the foreman that he was getting cold, and that his feet were very cold; and that the foreman prevented him from getting on the engine and told him, in vile and profane language, to go back to work; that when they started back to town the plaintiff was instructed by the foreman to get up on the tender, that he did so, and rode back to Scobey in that position; that on arriving at Scobey he reported to the foreman that his feet were frozen; and that some four hours later the foreman secured a doctor. It is undisputed that plaintiff froze both of his feet, and that as a result he was confined to his bed in Scobey for four days and on the fifth was taken to Williston by the defendant and placed in a hospital in that city; that he remained in such hospital for some time; and that the defendant's surgeon amputated two toes on the left foot. The testimony also showed that at the time of the trial both feet were discolored; that the cause of the discoloration was the enlargement of the blood vessels thereby causing a lack of normal circulation and rendering the feet more susceptible to heat and cold. A physician testified that this condition was permanent.

The plaintiff's testimony is disputed on many points. The foreman specifically denied that he ever promised to take along a heated coach or build fires along the railroad track, but he admits that he stated they would go out only 2 or 3 miles and be gone only for two or three hours. He, however, denied positively, that he refused to permit the plaintiff to get on the engine for the purpose of warming himself, or that he used the language which plaintiff claims, or any other abusive language, toward the plaintiff.

Appellant contends that plaintiff was not engaged in interstate commerce within the meaning of the Federal Employer's Liability Act. The contention is obviously without merit. The question was not raised in any manner in the court below. And there was no reason for raising it as the evidence all showed that the passenger trains on the line where plaintiff was employed at the time he sustained his injuries were all interstate trains. Plaintiff was engaged in clearing a track over which an interstate passenger train would leave Scobey the following morning. He was clearly engaged in interstate commerce. *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Lombardo v. Boston & M. R. Co.* 223 Fed. 427; *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328; *Sanders v. Charleston & W. C. R. Co.* 97 S. C. 50, 81 S. E. 283; *Clark v. Chicago, G. W. R. Co.* 170 Iowa, 452, 152 N. W. 635; *Southern R. Co. v. Puckett*, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69. See also *Hein v. Great Northern R. Co.* 34 N. D. 440, 159 N. W. 14.

Defendant, also, contends that: (1) Defendant's negligence has not been proven; (2) plaintiff was guilty of contributory negligence; and, (3) plaintiff assumed the risk of the injuries. And it is therefore argued that the court erred in denying a motion for a directed verdict based upon these grounds.

It is, of course, elementary that negligence, contributory negligence, and assumption of risk are, ordinarily, questions for the jury. They become questions of law only when reasonable men, from the evidence, can draw but one conclusion with respect thereto.

As already stated this action was brought under the Employer's Liability Act of Congress, April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208. There is no liability under that act in the absence of negligence on the part of the Railroad Company or some of its employees. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501-502, 58 L. ed. 1062-1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Manson v. Great Northern R. Co.* 31 N. D. 643, 649, 155 N. W. 32. But by § 3 of the act is declared that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in propor-

tion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The statute established the doctrine of comparative negligence, and abolished contributory negligence as a bar to recovery. Contributory negligence is a factor, and may still be shown (except in the case of a violation of a statute enacted for the safety of the employees), but its only effect is to diminish the damages. And in case the employee has by his own negligence contributed to the injury, his damages are to be diminished in proportion to the amount of negligence attributable to the negligent employee as compared with the combined negligence of the employee and the employer. As was said by the United States Supreme Court in *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 121, 122, 57 L. ed. 1096, 1100, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172:

"The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee's means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of the negligence attributable to the employee."

Hence, the trial court was clearly right in refusing to direct a verdict on the ground of contributory negligence, and properly submitted that question to the jury as one to be considered in diminution of damages only.

We are also of the opinion that the trial court was entirely correct in holding that the questions of negligence and assumption of risk were for the jury. The master is required to exercise such ordinary and reasonable care and precaution for the safety of his servant as the



nature and dangers of the business admit of and demand. As between master and servant negligence should be measured by the character and risk of the business engaged in. 26 Cyc. 1077, 1078. While a servant on accepting the employment assumes all the ordinary and usual risks and perils incident thereto, which he knows, or may, in the exercise of reasonable care, know to exist, he does not assume the extraordinary and unusual risks of the employment. 26 Cyc. 1177-1180. And the servant has a right to rely upon representations and assurances of the master, as to the absence of, or precautions against, danger, unless the danger is obvious and imminent. 26 Cyc. 1185. See also *Southwestern Brewery & Ice Co. v. Schmidt*, 226 U. S. 162, 57 L. ed. 170, 33 Sup. Ct. Rep. 68. Judge Cooley, said:

"It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley, *Torts*, 3d ed. pp. 1156, 1157.

The principle announced by Judge Cooley is applicable to the case at bar. *Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 287; *Schumaker v. St. Paul & D. R. Co.* 46 Minn. 39, 12 L.R.A. 257, 48 N. W. 559. As was said by the court in *Hyatt v. Hannibal & St. J. R. Co.* supra: "What difference can there be in an assurance against danger from defects in machinery and against danger from being extraordinarily exposed to the rigor of extraordinary weather? If, as was said, the master cannot prevent the severity of the weather, he can very well provide against it. . . . Notwithstanding the defendant might not

have been liable in this case if he had not promised to provide protection from the extraordinary weather; . . . yet, when the assurances were given, and the plaintiff was induced thereby to undertake the extraordinary work, it became the duty of the defendant to protect him in the manner assured."

Defendant, also, predicates error upon the court's instructions to the jury. In its brief, defendant says: "If the court was satisfied as a matter of law that the defendant was guilty of gross negligence, and the plaintiff only guilty of slight negligence in comparison, he should have so instructed the jury, deciding the question himself." It further says: "In every personal injury case arising under our statute where a railroad employee is involved, there is a question to be settled either as a matter of law or by the jury, which is a condition precedent to the right of recovery. That question is, Was the negligence of the plaintiff slight and the negligence of the defendant gross in comparison? If the facts are not disputed, or even though disputed, reasonable minds could only draw one conclusion therefrom, and it appears that the negligence of plaintiff was not slight, or on the other hand, that the negligence of defendant was not gross in comparison with the plaintiff's negligence, there can be no recovery as a matter of law, and the court upon application should direct a verdict."

In our opinion defendant's contentions are erroneous, and in direct conflict with the provisions of the statute. The Federal Employer's Liability Act was enacted for the purpose of making certain changes in the then existing law relating to interstate railroads and their employees. Under the laws in force at the time of the enactment of the Employer's Liability Act, an employer, though guilty of actionable negligence, would be absolved from liability by establishing the contributory negligence of the employee. The Employer's Liability Act expressly changed this, and provided that contributory negligence on the part of the employee should no longer absolve the employer from liability, but should merely be available as a defense upon the question of the amount of damages. Where the causal negligence is partly attributable to the employer, the contributory negligence of the employee will not defeat recovery, but only lessen the damages. "It is only when plaintiff's act is the sole cause,—when defendant's act is no part of the causation,—that defendant is free from liability under the act."

Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836; *id.*, 233 U. S. 42, 47, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Pennsylvania Co. v. Cole, 214 Fed. 948; Louisville & N. R. Co. v. Holloway, 163 Ky. 125, 173 S. W. 343. See also Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

As already pointed out there can be no recovery under the Employer's Liability Act in the absence of actionable negligence on the part of the railroad company or its employees. A party, in order to maintain an action under the act must allege and prove (as in other actions based upon negligence): (1) The existence of some duty or obligation on the part of the defendant toward the plaintiff; (2) a failure to discharge that duty; and, (3) injury resulting from such failure. And, of course, when the employee's negligence is in fact the sole cause of the injuries, he is not entitled to recover any damages from his employer.

The Federal Employer's Liability Act in effect says to the employer: In case one of your employees sustains injuries by reason of your failure to discharge any legal duty which you owe him, you will be required to compensate him therefor to the extent, and to the extent only, that your negligence has caused him detriment. On the other hand it says to the employee: In case you are injured through the negligence of your employer, he will be required to compensate you for the detriment you suffer by reason of his negligence; if you are injured by reason of the combined negligence of yourself and your employer, you must bear that portion of the detriment which your own negligence occasions, and can recover from your employer only such amount as will compensate you for the share of your total loss which your employer has occasioned; but if your injury is in fact occasioned solely through your own negligence then you, and you alone, must bear the loss.

The remaining exceptions to the instructions are so obviously devoid of merit as to merit no consideration.

The judgment and order appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

**F. E. McCURDY, Respondent, v. B. W. AYLOR, Appellant.**

(170 N. W. 523.)

In an action for the recovery of damages for breach of warranty in the sale of ewes, which warranty related to the time when the ewes would lamb, it is held:

**Contract for sale of ewes — breach of warranty — damages — action to recover — express warranty — evidence of jury — finding on.**

1. That there is ample evidence from which the jury could find an express warranty.

**Cross-examination — letters introduced on — bear on credibility.**

2. Where a series of letters passing between plaintiff and defendant are introduced as part of the cross-examination of the defendant, the letters are held to have a bearing upon the credibility of the defendant as a witness and to have been properly admitted for the purpose stated, even though the letters of the plaintiff contain self-serving statements.

**Damages — evidence of — confirmed certain pleadings.**

3. The plaintiff not claiming damages for losses accruing to him after the ewes came into his possession, evidence as to their care by the plaintiff was properly excluded.

Opinion filed November 30, 1918. Rehearing denied December 24, 1918.

Appeal from the District Court of Traill County, *A. T. Cole, J.*  
Affirmed.

*F. E. McCurdy* and *Iver Acker*, for respondent.

A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future. Comp. Laws 1913, § 5973; 35 Cyc. 373-375 inclusive.

*Carmony & Leslie*, for appellant.

Where the contract is in writing it is for the court to construe it and to decide whether it contains a warranty or not. *Hobert v. Young*, 12 L.R.A. 697; *Wason v. Rowe*, 16 Vt. 525, 12 L.R.A. 694.

Where the evidence is such as to leave no doubt of the legal force of the language of the representation, the court may and should declare its effect. *Short v. Woodward*, 13 Gray, 86; *Halliday v. Briggs*, 18 N. W. 55; *Holmes v. Tyson* (Pa.) 15 L.R.A. 209.

The naked averment of a fact is neither a warranty itself nor evi-

dence of it. In connection with other circumstances it may certainly be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representations. *McFarland v. Newman*, 9 Watts, 55, 34 Am. Dec. 497; *Holmes v. Tyson*, (Pa.) 15 L.R.A. 209.

**BIRDZELL, J.** This is an appeal from an order denying a new trial. The action is for the recovery of damages for breach of warranty in the sale of some sheep, and a breach of an alleged agreement to ship them properly. The action was tried in the district court of Traill county, resulting in a verdict in favor of the plaintiff, assessing his damages at \$275 with interest from January 24th, 1916, upon which judgment was entered. It appears that in December, 1915, the plaintiff and respondent negotiated with the defendant and appellant for the purchase of some ewes, and that during the course of the negotiations defendant described to the plaintiff some ewes he had for sale as follows: "I also have 146 Western ewes, bred to registered rams to begin lambing May 20th. These are twos and threes with some fours. They are all good ewes; I picked 300 from a flock of 600 when I bought them, and have sold 150 of them within the last two weeks. I am offering the balance at \$6.50. They will weigh around one hundred pounds and will shear about nine pounds. . . . These prices are good for ten days." Following the receipt of this letter, the plaintiff arranged to have the offer kept open until January 10th, on which date he went to the defendant's farm, examined the sheep and bought them. In addition to the western ewes, he also bought some Shropshires, which are not involved in this action. Following this transaction, the defendant shipped the ewes to the plaintiff, billing them to Backoo, North Dakota. The plaintiff claims damages due to the alleged failure to line the cars with paper to protect the sheep from the inclemency of the weather. There is evidence that the ewes arrived in bad condition, due to the manner in which they were shipped; that some lambs were born en route; and that practically all of the ewes gave birth to lambs during January and February.

The appellants, upon this appeal, claim that the entire question of the plaintiff's right to recover depends upon the existence of a warranty with respect to the time when the western ewes would lamb, and

the damages incident to its breach. A number of alleged errors occurring during the trial are assigned. They all relate to the admissibility of evidence and to the instructions of the court, and will be considered in the order in which they are argued by the appellant.

It is argued that the court erred in allowing the plaintiff to introduce in evidence a series of correspondence consisting of thirteen letters which passed between the plaintiff and defendant and which were written after the sale and delivery of the sheep; eight of them were from the plaintiff to the defendant, the remainder being written by the defendant. These letters were introduced during the cross-examination of the defendant for the purpose, as claimed by the plaintiff, of their effect upon the credibility of the defendant as a witness. It is claimed that the letters from the plaintiff to the defendant contained many self-serving declarations and that, for this reason, they should be excluded. It is true that in them the plaintiff stated and reiterated his claim for damages incident to the alleged breach or breaches of warranty. But it is also true that the whole series of correspondence must be read together in order that there may be fair understanding of the attitude assumed by the defendant toward the plaintiff's claim. When the whole series of correspondence is read in connection with the evidence offered by the defendant, the evident purpose was to show inconsistency in the contentions of the defendant. When thus considered, the letters have not only a direct bearing upon the credibility of the defendant as a witness, but also tend to establish prior admissions contrary to his present attitude. Witnesses were brought forward by the defendant to testify that the condition of ewes which were to give birth to lambs approximately a month in the future could be readily determined upon inspection. This testimony could have no relevancy to the case if it were not introduced for the purpose of establishing that after the inspection of the ewes by the plaintiff on January 10th, the plaintiff could not claim reliance upon the previous express warranty, if such it was, that the ewes would lamb in May. It seems to have been the theory of the defense, first, that the defendant's offer did not contain an express warranty concerning this matter; and, second, if it be construed as amounting to an express warranty, the effect of it was overcome by the personal inspection of the plaintiff.

If the evidence of defendant's witnesses is true and the defendant

had the experience as a sheep man which he claims to have had, the assumption of ignorance as to the condition of the ewes when they were inspected by the plaintiff on January 10th, which is repeated throughout the correspondence, is wholly unjustified. In view of this state of the record, we think the letters were admissible for the purpose for which they were received, and we note that, in the instructions given, the trial court expressly limited the evidence to the matter of credibility.

It is next argued that the court erred in allowing the witness, A. C. McCurdy, to testify from his knowledge and experience as a sheep man concerning the impracticability of saving any considerable percentage of lambs born during the winter season; that birth of lambs in cold weather has a bad effect on the wool of the ewe; and that he could tell from the appearance of the lambs whether they were scrub stock or well bred. The witness had testified to his experience as a sheep man, covering a period of practically three years' employment by a man who had made sheep a business, during which time he had paid "more or less" attention to a study of the subject. It seems that the matters concerning which he testified were controverted and warmly contested during the entire trial, the plaintiff producing other witnesses who testified along the same line as A. C. McCurdy and the defendant producing a number of witnesses who testified to the contrary. We are by no means satisfied that the witness, A. C. McCurdy, was properly qualified to testify as an expert. Yet, in view of the other testimony in the case, and of the further fact that the jury must have understood fully the extent of his experience, we are satisfied that the admission of the testimony objected to does not constitute reversible error.

The witness, A. C. McCurdy, testified to the condition of the sheep upon their arrival at Backoo. This was objected to on the ground of its irrelevancy. The plaintiff had testified to an undertaking upon the part of the defendant to paper the cars, if necessary, to protect the sheep from damage in transit; and in his complaint, the plaintiff claims damages for a breach of this undertaking. In view of this testimony and this claim, it was clearly proper to show the condition of the sheep upon the arrival.

The plaintiff and other witnesses testified to the difference in value between Western ewes bred to lamb in May and similar ewes which

would lamb in February, March, and April. There was clearly no error in allowing this testimony to be admitted. Neither was error committed in the introduction of the deposition of O. W. Roberts, wherein he testified to the weather bureau record showing the temperature on the days during which the sheep were shipped. The witness was shown to be in charge of the weather bureau in Bismarck, where such records are kept. This testimony is material and relevant as bearing on that part of the claim which is predicated upon the failure to properly ship the sheep.

Evidence offered by the defendant as to the care of the sheep after they were received at Backoo was excluded, and we think properly so, because the plaintiff made no claim for damages except those accruing while the sheep were in transit, and those based upon the difference in value between ewes lambing at different seasons of the year.

We are satisfied that there was ample evidence to go to the jury tending to prove a warranty made by the defendant with respect to the time when lambs would be born. This evidence consists not only of the defendant's letter offering the ewes for sale, but also the testimony of the plaintiff as to the conversation had at the time of inspection.

An examination of the charge given shows that the court correctly instructed the jury as to what would constitute a warranty. The instruction upon this subject is: "In this connection you are instructed that any positive statement or affirmation of fact, and not of opinion, as to the quality of condition of the sheep sold made by the seller, the defendant in this case, in the course of the negotiations and naturally and fairly importing that he intended to bind himself to its truth, and which was so understood and relied upon by the buyer, the plaintiff herein, constitutes or would constitute a warranty. If, therefore, you find that there was any positive statement or affirmation of fact, and not of mere opinion, as to the breeding of the ewes in question and as to the time of lambing, and that by reason of these statements or affirmations the plaintiff was induced to buy, and he relied upon such statements or affirmations as a warranty, and such statements or affirmations were a warranty as hereinbefore explained, then if you find that the warranty was untrue and that the ewes lambed before the time stated or claimed to have been stated by the defendant and relied upon



or claimed to have been relied upon by the plaintiff, and that the ewes were not bred as stated or claimed to have been stated by the defendant and relied upon or claimed to have been relied upon by the plaintiff, then you will determine any damages accruing to the plaintiff by reason of such facts as may have been proved by a fair preponderance of the evidence in this case and award such damages to the plaintiff, not in a sum, however, exceeding that in the complaint, which is the sum of \$525.

“A warranty is defined by our Code as follows: ‘A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future.’ [Comp. Laws 1913, § 5973.] A mere contract of sale or agreement to sell in this case would not imply a warranty such as is set out in the complaint herein and claimed by the plaintiff.

“To constitute a warranty there must be something more than a mere opinion and something more than a mere praise of the goods sold; there must be some positive statement or affirmation of the party whom it is claimed gave the warranty as to some quality or condition which goes to make up the value, use, and desirability of the property purchased for the purpose for which it is purchased, and such statement or affirmation must have been accepted as true by the party claiming damages and he must have relied thereon, and a breach of said conditions must be proven and damages consequent upon such breach before the plaintiff can recover.”

The foregoing, in our opinion, constitutes a full and complete statement of the law touching this subject as applied to the facts in the instant case, and under these circumstances it was not error for the court to refuse to give the instructions on the same subject requested by the defendant.

Finding no error in the record, the judgment is in all things affirmed.

GRACE, J. I concur in the result.

ROBINSON, J. I dissent.

RED RIVER VALLEY LAND COMPANY, a Corporation, Respondent, v. A. E. HUTCHINSON, Appellant.

(170 N. W. 317.)

**Broker—sale of lands—commission on—express contract—action to recover under—owner participating in negotiations for sale—reducing price—without knowledge of broker—without change of agency or agreement—full commissions recoverable.**

1. In an action by a broker to recover commissions earned under an express contract upon a sale of real property, where it appeared that the owner of the property co-operated in the negotiations with a purchaser produced by the broker, and where, during the process of the negotiations, the gross price was scaled by the owner before the final contract of sale was executed, without any modification of the agreement relating to commissions and without a termination of the agency, it is *held* that the broker is entitled to recover the full commission.

**Evidence—verdict—supported by.**

2. The evidence examined and *held* to support the verdict.

Opinion filed November 30, 1918. Rehearing denied December 26, 1918.

Appeal from the District Court of Cass County, *A. T. Cole, J.*

Defendant appeals.

Judgment and order affirmed.

*Sinness & Duffy*, for appellant.

Upon an express contract set out in the complaint, the proof must be specific in support thereof, and proof of a different agreement, if allowed, amounts to a failure of proof, and entitles defendant to a directed verdict, upon motion therefor. *Graangaard v. Betzina*, 33 N. D. 267; *Chaffee v. Widman*, 48 Colo. 34, 139 Am. St. Rep. 220, 108 Pac. 995.

Where lands are listed with a broker for sale upon stated terms, the broker to receive a fixed sum as commissions, the execution of such listing contract to the point of supplying a purchaser ready, willing,

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**NOTE.**—On effect upon the right of real estate broker to commissions of fact that owner sells to broker's customer at reduced price, see note in 15 L.R.A. (N.S.) 272, and 34 L.R.A. (N.S.) 1050.

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and able to buy upon the terms stated, is the condition precedent to the right to recover the agreed compensation. *Paulson v. Reeds* (N. D.) 167 N. W. 371; *Anderson v. Johnson*, 16 N. D. 174; *Fulton v. Cretian*, 17 N. D. 335; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719; *Terry v. Bartlett*, 153 Wis. 208, 140 N. W. 1133; *Gilmore v. Bolio*, 165 Mich. 633, 131 N. W. 105; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. Rep. 683; *Eggland v. South* (S. D.) 118 N. W. 719.

"If a broker fails to bring a customer to terms, and then abandons the negotiations or they are broken off, he is not entitled to a commission where a sale is subsequently made by the owner to the customer through independent negotiations." 9 C. J. 621; *Ball v. Dolan*, 21 S. D. 619, 15 L.R.A.(N.S.) 272, 114 N. W. 998; *McFarland v. Boucher*, 153 Iowa, 716, 134 N. W. 91.

*Charles A. and Charles M. Pollock*, for respondent.

The law applicable to such cases is well settled in this state. *Paulson v. Reeds*, 156 N. W. 1033.

**BIRDZELL, J.** This is an appeal from a judgment in favor of the plaintiff and from an order denying a motion for a new trial, which were entered in the district court of Cass county. The action was brought for the recovery of a commission of \$5,000 alleged to have been earned in negotiating a sale of the defendant's land. The contract upon which the action is brought is alleged in the complaint as follows:

"That said defendant on or about the 20th day of May, 1916, offered in writing to this plaintiff through its said agent, Ingstad, that if it would become the agent of said defendant and make a sale of said property upon the conditions and terms agreeable to said defendant, he would pay a commission for doing the work in connection with making such sale in the sum of five thousand dollars (\$5,000) to be paid when the deal was completed."

The facts necessary to an understanding of the questions presented upon this appeal are as follows: The defendant and appellant Hutchinson in 1916 was a farmer and real estate dealer, residing at Minnewauken, North Dakota, and was the owner of a tract of land of considerable size which he was desirous of selling. In order to facilitate the disposition of the tract, the defendant caused to be printed a cir-

cular in which was set forth descriptive matter concerning the farm, with special reference to its attractive features. The farm was described in the folder by reference to an outline map which was a part thereof, and which showed that the boundary lines of the farm were irregular; that on one side they did not run in straight lines, due to the fact that a portion of the land embraced within the outline map consisted of bottom lands which had passed to the plaintiff as a riparian owner upon the recession of Devils Lake. The folder stated that the farm contained "approximately 3,600 acres, of which 320 acres are under cultivation and the balance in hay and pasture." It was further stated: "There are about 600 acres of deeded land and about 3,000 acres of lake bottom or riparian rights, some of this lake bottom being the richest land in the state." The circular further described the live stock, the farm machinery, utensils, etc. In stating the terms of sale the defendant stated in the folder that he had "decided to sell this beautiful farm either with or without the stock and machinery at a very reasonable price and will give a good stockman any reasonable terms and as many years to pay for it as he desires. . . . My price is \$20 per acre, including everything, stock, machinery, crops sown and planted, just as it stands at the time of purchase. I need not tell you that this is a bargain and remember, I will make practically any terms of payment wanted." In a circular letter accompanying the folder, the defendant stated: "I will pay a commission of \$5,000 upon the above deal, payable when deal is completed. Comb your lists and get this easy money. As I state I will make any reasonable terms of payment."

One of these descriptive circulars came into the hands of one, Fred B. Ingstad, a real estate agent who was at the time employed by the plaintiff. Upon receipt of the folder, Ingstad wrote the defendant suggesting a prospective deal and inquiring as to the acreage as follows: "In regard to the 3,000 acres of lake bottom of riparian rights, suppose you are in a position to give satisfactory papers for this." The defendant, in replying to this portion of the letter, stated: "Relative to the title to the riparian land or receded lake bottom would state that Ralph Ward of Garrison, North Dakota, has just invested several thousand dollars in just such land as I am offering, and I believe that his father-in-law, an attorney by the name of Stevens who lives in Bismarck, is

about the best informed attorney in the state along these matters has passed upon this very same thing. In fact I believe any first class attorney will, after looking the matter up, o. k. the title."

The foregoing correspondence was had on May 20th and prior thereto. On May 26th, Ingstad wrote Hutchinson from Kenneth, Minnesota, to the effect that he had a prospective buyer by the name of Frank Knowlton of Luverne, Minnesota, who was a thorough stockman and who would desire turning in on the deal some lands of his in Rock county, Minnesota. The letter contained considerable of the details of the prospective deal and Hutchinson immediately initiated negotiations with Knowlton. It appears from the subsequent correspondence that Knowlton was not altogether satisfied as to that portion of the land covered by the riparian rights and that Hutchinson was not satisfied to take in all of Knowlton's Minnesota land at the prices stated. In order to take care of this latter difficulty, a conditional contract was suggested by Ingstad, whereby the final consummation of the deal was made to depend upon the parties being able to effect the resale of the Minnesota lands within thirty days so that they would not have to be carried by Hutchinson. Subsequently Ingstad brought Knowlton up to the farm and a conditional contract of the character previously suggested by Ingstad was signed, which was dated June 19th, 1916. In that contract the gross consideration which Hutchinson was to receive and which, of course, embodies the Minnesota lands at Knowlton's figures, was \$70,000. Following the execution of this agreement, Ingstad and Hutchinson became active in their efforts to dispose of the Minnesota lands. On July 12th, Hutchinson telegraphed Ingstad who was, at the time, in Luverne, Minnesota, working on the resale of the lands: "If you can get me all cash for Kenneth and south quarters, I will discount each \$10 per acre. You can afford to throw off \$5 each out of your commission. . . ." On the same day he wrote Ingstad to the same effect, saying: "I would discount the Kenneth and south quarter each \$10 per acre. That would be \$3,200 providing I got all cash out of them, say \$100 down on each quarter, and the balance March 1st. Why can't you also cut \$2,500 off your commission. This would still give you and McLean \$1,000 apiece and \$500 for the other fellow, McDowell, I believe. Seems to me this would be a whole lot better than nothing. . . . Ingstad replied: "Your proposition, although

no doubt well meant, cannot be carried out at this time. I am very sorry you cannot see fit to close up as deal now stands. I am positive that should you make the deal as now stands that you will never have cause to regret it. . . . I do not think, after reading your letter, that it is advisable for me to spend any more time or money on this deal as McLean (one of the principal owners of the Red River Valley Land Company) will surely not stand for it. Hence my departure for Fargo." On July 26th, Ingstad wired Hutchinson as follows: "Knowlton agrees to cut \$10 per acre off two quarters, we also to cut our commission. Advise at once what to do." Hutchinson replied: "If you cannot turn land with Knowlton's, yours and my cut, better call deal off." Hutchinson again wired Ingstad on July 31st. (This telegram probably referred to a deal for the resale of the Minnesota lands upon which the Hutchinson sale depended.) "Hold deal. Will be in Luverne August 1st. Wait for me." After more correspondence Hutchinson induced Knowlton and his wife to come to Minnewauken, North Dakota, and while there the final agreement for the sale was made. The purchase price mentioned in the agreement was \$64,575, and it appears that the Minnesota lands had not been disposed of as contemplated by the original conditional contract. About the time the sale was made, Hutchinson wrote Ingstad, endeavoring to get him to reduce his commission. The letter was written on the supposition that Ingstad had severed his connection with the Red River Land Company. In his letter Hutchinson, after figuring that the deal would net him about \$60,000, said: "This is much less than I ever intended selling it for but I figured that we could arrange now that you have quit McLean that you would receive all the commission so I thought that you would rather have \$800 than nothing out of the deal." To this suggestion Ingstad replied: "If you think that McLean and McDowell cannot come in for a claim later I am satisfied with your proposition."

While the foregoing statement gives the facts relative to the transaction as they occurred in chronological order, we think the record justifies the following as a statement of conclusions of fact that must be drawn from the record. The acreage in the defendant's farm was indefinite and the parties dealt with respect to an approximate acreage only. This was due largely to the character of the description and from this fact it follows that the gross price obtained could not be said

to represent a given price per acre. Ingstad was clearly shown to have acted throughout as the agent of the Red River Land Company and during the course of the entire negotiations it does not appear that any final agreement was reached involving any reduction of commission. The defendant continued the negotiations down to the point of making the sale with full knowledge that the agency of the plaintiff had not been abandoned and the defendant never sought to terminate the agency. He did, however, endeavor to persuade Ingstad to reduce commissions by getting McLean and McDowell out of the deal altogether.

In our opinion the foregoing statement of facts is decisive of this case and renders necessary the affirmance of the judgment. Exceptions are taken to the charge given by the court. The court's charge, in substance, is the same as that given in the case of Paulson v. Reeds, 39 N. D. 329, 167 N. W. 371, recently decided by this court. The appellants argue that this decision is also decisive of this case, but this argument does not take into account the clear distinction which exists between the facts in the case of Paulson v. Reeds, and the facts hereinbefore stated. In Paulson v. Reeds, it appeared that there was strong evidence of a change in the commission contract at the time the sale contract was executed, it being understood that the agent was to make up the difference between the sale contract as negotiated and one which would have fulfilled in all respects the listing agreement; whereas, here, there is no evidence that the Red River Valley Land Company ever agreed to cut its commission. The facts are also distinguishable in that in the Paulson v. Reeds Case the parties were dealing with respect to an exact quantity of land at an exact price per acre, while in this case the parties were dealing with an approximate acreage only. In reality the charge in the instant case is different from the charge in the Paulson v. Reeds Case in this respect: That it was stated in this charge that if Hutchinson sold his land to the purchaser found by the plaintiff upon modified terms, "then the plaintiff, *in the absence of any new agreement*, is entitled to the compensation fixed by its original contract."

The appellant also argues that there is a failure of proof in that the plaintiff alleges an agreement to pay a commission of \$5,000 upon a sale of the farm upon conditions and terms agreeable to the defendant,

whereas the evidence shows that the agreement was to pay \$5,000 upon a sale of the land at \$20 per acre. In this connection, the appellant relies upon the case of Grangaard v. Betzina, 33 N. D. 267, 156 N. W. 1035, as controlling. The case at bar is likewise clearly distinguishable from the case of Grangaard v. Betzina, *supra*, in that the parties in the latter case were dealing upon the basis of a certain price per acre, whereas in the instant case throughout the negotiations it appears that the parties regarded rather the aggregate consideration of the sale, the defendant never stating the minimum net aggregate upon which he would be willing to pay the stipulated commission. Surveying the whole transaction, including Hutchinson's activity in himself pushing the negotiations and the amount of the activity and expense necessarily incident to the co-operation of the plaintiffs in this deal, it is apparent to us that the plaintiffs were at all times engaged in the fulfilment of an agency for the defendant. If the defendant negotiated a deal with the purchaser found by the plaintiff, without taking into account the plaintiff's claim for commissions earned, he has dealt unwisely. If a satisfactory deal, or one netting the defendant approximately the sum which was originally contemplated, could not be consummated with the plaintiff's purchaser, good faith required that the defendant terminate the agency, before undertaking a different deal. There were so many uncertain quantities in this deal from first to last,—terms of sale, acreage, values of exchange properties, etc., that the parties were clearly justified in considering the deal throughout as one and it seems that they did so consider it. The record shows quite conclusively that the defendant Hutchinson considered that he would be under obligation upon consummation of the deal to pay the \$5,000 commission; for, as changes were suggested during the pendency of the deal, he endeavored to have the plaintiff, on one occasion, cut its commission in two, thus recognizing that without the change it would be entitled to the full commission upon the consummation of the transaction.

It is further argued that the question of the abandonment of the agency should have been submitted to the jury. There is no evidence in the record that the defendant ever abandoned the agency. There is a suggestion that Ingstad had given Hutchinson the impression that he had quit the defendant company. This, however, would not be evi-



dence that the company had abandoned the transaction, and, in this connection, it should be noted that Ingstad, in reply to the suggestion that he cut his commission, shifted to the defendant the risk of a settlement with McLean and McDowell, who, of course, represented the plaintiff company. This was an absolute recognition by Ingstad, who had actively conducted the negotiations, of the rights of his principal.

Finding no error in the record, the order and judgment appealed from are affirmed.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). This is an appeal from a judgment for \$5,000 against the defendant for alleged services rendered in regard to the sale of certain land under a special contract. As it appears, for the sale of certain land at the sum of \$70,000, the defendant promised to pay \$5,000. The plaintiff never produced a purchaser ready or willing to pay \$70,000, or any sum in excess of \$65,000. Indeed, it was with considerable effort and some expense on the part of defendant himself that he was able to make a sale of the land at \$65,000. The contention of plaintiff is that inasmuch as defendant made a deal with the person whom the plaintiff tried to secure as a purchaser and made the sale for a reduced price he, the defendant, became liable to pay a commission of \$5,000 in accordance with the terms of the special contract, and the court did, in effect, charge the jury that in case there was an agreement to pay a commission of \$5,000 for a sale of \$70,000, and a sale at a less sum without any agreement to change the commission and if the plaintiff obtained a purchaser ready and willing to purchase the land upon different terms than first stated, and such modified terms were assented to by the defendant. The plaintiff in the absence of any new agreement is entitled to the compensation fixed by the original contract. That instruction is manifestly erroneous and the court repeated it over and over again so as to impress it on the mind of the jury.

Under such a law if the defendant had sold his property for \$5,000 and no more, the plaintiff would be entitled to recover the \$5,000 as his commission. Indeed, in case he made any sale whatever, even

for \$1,000, or \$1, the plaintiff would still be entitled to recover the same \$5,000.

And so, if a party should contract to pay \$1,000 for the building of a two-story house worth \$4,000, and then cause the contractor to make it a one-story house worth \$2,000, the carpenter or contractor would still be entitled to a compensation of \$1,000 in the absence of a special contract fixing a different compensation, but such is not the law. For the building of a one-story house, the carpenter would have no right to recover on a special contract for the building of a two-story house. For the one-story house his right to recover would be limited to the reasonable value of his services.

And so it is in every case where a party sues to recover on a special contract, *he must prove a substantial compliance with the terms of the contract*. The charge of the court was manifestly wrong and contrary to the decision of the court in *Paulson v. Reeds*, 39 N. D. 329, 167 N. W. 371.

It furthermore appears that in charging the jury the court read to them the argumentative complaint which might well have been received as a part of the charge of the court. In charging a jury there is no occasion for reading the pleadings of either party, or for repeating the same thing over and over again in different language. The charge should be short and pointed and limited to the issues in the case. A judge seldom gives a charge without overdoing it. There is always a disposition to talk too much.

The judgment should be reversed.

#### On Petition for Rehearing.

BIRDZELL, J. In petition for rehearing counsel for the appellant renew the main argument advanced upon the hearing, to the effect that the decision in this case is necessarily controlled by the prior decisions of this court in *Grangaard v. Betzina*, 33 N. D. 267, 156 N. W. 1035, and *Paulson v. Reeds*, 39 N. D. 329, 167 N. W. 371. As we interpret the facts, however, this case falls clearly within the widely recognized rule that, where a broker, who is employed at a stipulated commission to sell lands on given terms, finds a purchaser with whom the seller negotiates a sale upon terms and conditions differing from those named

to the agent, the agent will still be entitled to his commission if he is the efficient cause of the sale and if the transaction is consummated while he is still acting as agent, and without any change in the commission. That the authorities generally support and adhere to this rule will be seen by referring to the following citations: 9 C. J. 600-602; 19 Cyc. 249, 250: 1 Clark & S. Agency, § 361; 2 Clark & S. Agency, § 773; note in 34 L.R.A.(N.S.) 1050; Jones v. Adler, 34 Md. 440; Grether v. McCormick, 79 Mo. App. 325; Wetzell v. Wagoner, 41 Mo. App. 509; Jennings v. Overholt, 186 Mo. App. 505, 172 S. W. 449; Duncan v. Turner, 171 Mo. App. 661, 154 S. W. 816; Shober v. Blackford, 46 Mont. 194, 127 Pac. 329; S. E. Crowley Co. v. Myers, 69 N. J. L. 245, 55 Atl. 305.

As we view the prior decisions of this court, referred to by counsel for appellant in his petition, none of them can be said to conflict with the principle above stated. In fact, in Paulson v. Reeds, upon the last two appeals, the rule which, in our judgment, is controlling in the case at bar, was tacitly recognized. See Paulson v. Reeds, 33 N. D. 141, 156 N. W. 1031, and Paulson v. Reeds, 39 N. D. 329, 167 N. W. 371. The reversals were necessary in both appeals for the reason that, under the instructions given, the jury were practically directed to return verdicts for the full amount of the commission claimed, regardless of any change that might have been agreed upon by the parties at the time the sale contract was executed. Upon the last appeal the court was unanimously of the opinion that the jury must be given the right to determine whether or not a change had been effected in the commission agreement. Reference to the dissenting opinion of Mr. Justice Grace will disclose that the only difference of opinion was as to whether or not, under the instructions, the jury could have taken the alleged change into consideration, the majority of the court being of the opinion that it could not, whereas Mr. Justice Grace interpreted the instructions otherwise.

Of the authorities cited in support of the rule, which we regard as decisive of this case, the case of S. E. Crowley Co. v. Myers, 69 N. J. L. 245, 55 Atl. 305, perhaps most aptly illustrates the principle and the distinction, as will be seen in the following paragraphs of the syllabus:

"2. When the authority conferred is to sell at the price of \$70,000,

the owner may decline to accept a proposing purchaser whose offer is to buy the lands at the price fixed to be paid, not all in cash, but in part by the conveyance to the seller of other lands at the price of \$30,000. But if the owner accepts such an offer, the agent is entitled to his commissions.

"3. If the owner, upon receiving such an offer, accepts it on an agreement with the agent that he shall not be entitled to or receive commissions upon the price at which the lands are taken in exchange until the agent has procured a satisfactory purchaser for such lands, and the agent has failed to do so, a defense available in an action for commissions is disclosed upon a proof of the agent's failure. Whether the acceptance of the owner was upon such a condition, if contested, presents a mere question of fact."

In the case at bar, there was no evidence that there was any agreement reached, involving a change in the commissions, and in this respect the case differs both from *Paulson v. Reeds* and *S. E. Crowley Co. v. Myers*, supra. But it comes directly within the principle supported by all the authorities above cited.

The petition for rehearing is denied.

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**ADELIA HOGAN, Respondent, v. JOHN BRAGG, Appellant.**

(170 N. W. 324.)

**Prairie fire—escape from control—death of husband—caused by—damages—verdict and judgment.**

1. The defendant appeals from a verdict and judgment for \$1,500 on the charge of permitting to escape from his land a prairie fire which caused the death of the plaintiff's husband.

**Prairie fire statute—application of—setting fire to straw stack on farm—snow on ground—lapse of twenty days before fire escaped—defendant not guilty of negligence.**

2. In this case the prairie fire statute does not apply as there was no setting

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NOTE.—For authorities passing on the question of liability for injury by prairie fire, see note in 21 L.R.A. 261, where it is held that a back fire set against an approaching prairie fire will render the one setting it liable for the damage caused thereby.

fire to woods, marsh, prairie, or stubble. The fire was set to the bottom of an old straw stack in March, when the ground was covered with snow and when there was not the least apparent danger. Such a fire is a matter of common and yearly occurrence on nearly every farm in the state, and the defendant was in no manner guilty of negligence in permitting the fire to escape after the lapse of twelve days and after a second snow storm.

Opinion filed November 30, 1918. Rehearing denied December 26, 1918.

Appeal from the District Court of Kidder County, Honorable W. L. Nuessle, Judge.

Defendant appeals.

Reversed and dismissed.

*S. E. Ellsworth*, for appellant.

The defendant was not guilty of any negligence. He set fire to a straw pile on his farm so as to remove it out of his way. No prairie fire was set by him or allowed to escape from him. There was a lapse of twenty days after the straw pile was set on fire before it escaped into the field and prairie. A very strong wind came and fanned the fire into a flame. Defendant supposed the fire had burned out.

Defendant and his hired man did all in their power to stop the spread of the fire, by the use of ordinary and usual methods.

Defendant was not liable for failure to use all means possible.

Reasonable effort and the use of such means as are reasonably available is the measure of his duty in such case. Even if defendant had set the prairie fire, he was bound to exercise only ordinary care and diligence to prevent it from spreading. *Thomp. Neg. § 729; McCully v. Clark*, 40 Pa. 399, 80 Am. Dec. 584; *Baird v. Chambers*, 15 N. D. 617, 109 N. W. 61.

The object in "imminent peril" from negligence which will permit a volunteer to rashly attempt to save it, and, being injured therein, recover for his injuries of one negligent as though the original negligence were toward him, the volunteer, must be a human being; imminent peril to property is not enough. *Eversole v. Wabash Ry. Co.* 249 Mo. 523, 155 S. W. 419; *Southern R. Co. v. Dixon (Ga.)* 75 S. E. 462.

One who voluntarily assumes a position of danger, the hazard of which he understands and appreciates, cannot recover for resulting in-

juries unless there is some reason of necessity or propriety to justify him in so doing. 20 Cyc. 518; 29 Cyc. 982; *Drummer v. Milwaukee Elec. R. Co.* (Wisc.) 84 N. W. 853; *Healy v. Chicago City R. Co.* 167 Ill. App. 524; *Robinson v. Manhattan R. Co.* 25 N. Y. Supp. 91; *Straus v. Sage*, 25 N. Y. Supp. 93; *Maltby v. Beldon*, 54 L.R.A. 52, 167 N. Y. 307; *Berg v. Great Northern R. Co.* (Minn.) 73 N. W. 648.

Where one voluntarily and unnecessarily enters into a very dangerous place knowing fully of such dangers like into a burning building or "woodshed," and sustains bodily injuries, another person cannot be held liable in damages.

Defendant's responsibility cannot be created or increased by such independent and voluntary conduct on the part of plaintiff in putting himself in harm's way. *Cook v. Johnson* (Mich.) 25 N. W. 388; *Polk v. Spokane Interstate Fair* (Wash.) 132 Pac. 401; *Wherry v. Duluth M. & N. R. Co.* (Minn.) 67 N. W. 223; *Teachout v. Grand Rapids G. H. & M. R. Co.* (Mich.) 146 N. W. 241; *Wiethoff v. Shedden Cartage Co.* (Mich.) 105 N. W. 748; *Sapienza v. Worden-Allen Co.* (Wis.) 138 N. W. 611.

The question of contributory negligence is for the jury only when the evidence on such subject is conflicting.

Where it is wholly one-sided and shows no negligence on the part of defendant, a directed verdict must be given. *Mares v. N. P. Ry. Co.* (Dak.) 21 N. W. 5; *Morrison v. Lee*, 16 N. D. 337, 113 N. W. 1025.

Here the deceased lost his life directly through his want of the most ordinary care and thought for his own safety, and not through any negligence of defendant. *West v. Northern P. Ry. Co.* 13 N. D. 221, 100 N. W. 254; *Hope v. R. Co.* 19 N. D. 438, 122 N. W. 997; *Umsted v. Colgate Farmers Elevator Co.* 22 N. D. 242, 133 N. W. 61; *Sherlock v. Mpls. etc. Ry. Co.* 28 N. D. 128, 147 N. W. 791; *Nordby v. Sorlie*, 35 N. D. 43, 160 N. W. 70; *Derringer v. Tatley*, 34 N. D. 43, 157 N. W. 811.

*Knauf & Knauf*, for respondent.

Questions relative to the condition of Mrs. Bragg's mind as to fear of fires, or whether or not she was "apprehensive" of fires, were entirely immaterial, and the court very properly sustained objections to them. *American Soda Fountain Co. v. Hogue*, 17 N. D. 375, 116 N. W.

339; *Bristol & Sweet v. Skappie*, 17 N. D. 271, 115 N. W. 841; *Mulroy v. Jacobson*, 24 N. D. 354, 139 N. W. 698; *Iverson v. Look*, 32 S. D. 321, 143 N. W. 332.

In the case at bar, the decedent was not such a "volunteer" as is excluded or precluded from recovery, as the law describes and defines such a person. He was working in his own interest and fighting to save his own property. He was trying to prevent his home and property from being destroyed. *Ebersole v. Wabash R. Co.* 155 S. W. 419; *Robinson v. Manhattan R. Co.* 25 N. Y. Supp. 91; 146 N. W. 245; *Berg v. G. N. R. Co.* 73 N. W. 648; *Liming v. Railroad Co.* 81 Iowa, 246, 47 N. W. 66; *Rajnowski v. Railroad Co.* 74 Mich. 20, 41 N. W. 847; 78 Mich. 681, 44 N. W. 335; *Comp. Laws* 1913, § 5948.

When fire is negligently permitted to spread, after being set, there is no reason why the damages sustained therefrom should not be paid. *Sekerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239; *Comp. Laws* 1913, § 2793; *Wilson v. N. P. R. Co.* 30 N. D. 456, 153 N. W. 429 and cases cited; *Rajnowski v. R. Co.* 78 Mich. 681, 44 N. W. 355; *Clanz v. C. M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575; *Liming v. I. C. R. Co.* 81 Iowa, 250, 47 N. W. 66; *McKenna v. Baessler*, 86 Iowa, 197, 53 N. W. 103; *I. C. R. Co. v. Siler*, 15 L.R.A.(N.S.) 819, 82 N. E. 362; *Wasmer v. D. L. & W. R. Co.* 80 N. Y. 213, 36 Am. Rep. 609; *Toledo P. & W. Co. v. Pindor*, 53 Ill. 447, 5 Am. Rep. 57; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448.

Defendant acted prudently and merely did what any right-minded man would do, to save his own property and home from destruction, and his death was the direct result of his exertions in trying to save his property. *Liming v. Ill. C. R. Co.* 81 Iowa, 250, 47 N. W. 62; *McKenna v. Baessler*, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 103; *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335; *Berg v. G. N. R. Co.* 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648; *Illinois C. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 609; *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575; *Sorenson v. Switzer*, 37 N. D. 536, 164 N. W. 136; *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Wilson v. N. P. R. Co.* 30 N. D. 467, 481, 482.

ROBINSON, J. The defendant appeals from a verdict and judgment for \$1,500 on the charge of permitting to escape from his land a prairie fire which caused the death of plaintiff's husband. On March 21, 1915, the ground being covered with snow and defendant absent from his home on the southeast quarter 24-141-74, the hired man of defendant did of his own motion set fire to a straw bottom about half a mile from the house. On April 5, as the snow had melted and the straw bottom was still smouldering, the defendant plowed around it six furrows with a gang plow. Then another snow fell and lay for about six days till the fire had apparently burned out. However, at noon of April 9, a high wind from the northwest started up the smouldering fire. This the defendant observed and with his hired man hastened toward the fire which was instantly blown from the straw bottom to the stubble and the prairie, and the result was an immediate and uncontrollable prairie fire.

Soon a number of persons arrived on the scene and all of them took part in fighting the fire. But as the wind continued to blow with great and increasing violence, the fire flew over the prairie. With several others Hogan, the deceased, took the risk of attempting to back-fire and he was caught in the on-rushing flame and fatally burned so he died on the same day.

When the fire was started, it was not subject to the control of any person, and it behooved all persons to keep out of its way. "No man is responsible for that which no man can control." Maxims. (Comp. Laws 1913, § 7260). Even if defendant was negligent in permitting the fire to escape from his land, he was liable only for the proximate loss and not for a death resulting from a person rushing into, or in front of, an onrushing flame. Such a loss is too remote. "For the breach of an obligation not arising upon contract, the measure of damage is the amount which will compensate for all the detriment proximately caused thereby." Comp. Laws § 7165.

Proximate cause is that which in a natural and continuous sequence produces the event. 32 Cyc. 745.

In order to find that an act not a wilful wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it



ought to have been foreseen and guarded against. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259.

True, the statute makes it a misdemeanor to set fire to any woods, marsh, prairie or stubble lands except in the months of July and August without first plowing around the same a strip of land 50 feet wide. Sections 2791, 2792. But here there was no setting fire to woods, marsh, prairie, or stubble. Hence, the prairie fire statute has no application. The fire was set to the bottom of an old straw stack when the ground was covered with snow and when there was not the least apparent danger. Such a fire is a matter of common and yearly occurrence on nearly every farm. And defendant was in no manner guilty of even ordinary negligence in permitting the escape of the fire after the lapse of twelve days and after the second snow; he had no reason to suspect the possibility of such a fire and its escape across the six furrows which he had plowed.

By § 5948, every one is responsible not only for the result of his wilful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself. It is on this statute that plaintiff must base her claim to recover for the accident and there is no evidence to charge the plaintiff with any lack of ordinary care, and, as the evidence does show beyond question, the deceased brought the injury upon himself by want of ordinary care. Without reason or necessity he purposely ran into the path of an on-rushing prairie fire, and thereby risked and lost his life. There was no evidence to sustain the verdict for the plaintiff, and on the evidence it is clear that the plaintiff has no cause of action.

Judgment reversed and action dismissed.

GRACE, J. I concur in the result.

CHRISTIANSON, J. I dissent.

THOMPSON A. PRICE, Appellant, v. HOWARD WILLSON, Respondent.

(171 N. W. 245.)

**Place of trial—change of—application for—time of—failure to timely make—default judgment—trial court may relieve from—necessary showing.**

Where a defendant through mistake, inadvertence, or excusable neglect fails to demand a change of place of trial and to interpose an answer within the time prescribed by law, the trial court may upon proper showing relieve the defendant from his default, both as regards the failure to answer and the failure to demand a change of place of trial.

Opinion filed December 27, 1918.

From an order of the District Court of Stutsman County, *Coffey J.*, plaintiff appeals.

Affirmed.

*John A. Jorgenson*, for appellant.

The court erred in changing the county or place of trial over objection, as no demand therefor was made "before the time for answer had expired." Comp. Laws 1913, § 7418.

It is the general rule that under statutes permitting demand for change of venue to be made "before answer," it may be made at any time before answer is actually served, whether within the original time allowed by statute, or within a time enlarged by stipulation.

But under statutes like that of this state the demand must be made "before the time for answering expires." *Irwin v. Taubman*, 26 S. D. 450, 128 N. W. 617.

*M. J. Englert*, for respondent.

In a civil action, where through excusable mistake, oversight, and inadvertence a judgment is obtained by default, upon a proper showing, the trial court may not only relieve from such default judgment and reopen the case for further proceedings, but it may also hear and grant a motion for a change of the place of trial to the county of defendant's residence; Comp. Laws 1913, § 7483; *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95.

41 N. D.—14.

CHRISTIANSON, Ch. J. This is an action for false imprisonment commenced in the district court of Stutsman county. The defendant is a resident of Barnes county, and the summons and complaint herein were served by leaving copies thereof at defendant's dwelling house in said Barnes county on January 4th, 1918. The defendant was in Canada at the time the papers were served. On his return he retained attorney M. J. Englert of Valley City, and informed him that the papers had been served on January 11th, 1918. On February 6th, 1918, Englert prepared and mailed to plaintiff's attorney a demand for change of place of trial, supported by an affidavit showing that the defendant was a resident of Barnes county. Englert, also, requested plaintiff's attorney to stipulate a change of venue and inclosed a stipulation providing therefor. These papers were received by plaintiff's attorney on February 7th, 1918, and he returned them on the same day with a letter stating in effect that inasmuch as the time for answering had expired he could not sign the stipulation. The defendant thereupon made an application to be relieved from the default and to be permitted to serve and file an answer; and that the place of trial be changed from Stutsman county to Barnes county. The trial court granted the application, and plaintiff has appealed.

No complaint is made of, or error predicated upon, that portion of the order which permitted the defendant to serve and file an answer. The sole error assigned is, that the court erred in ordering a change of the place of trial. The instant action is one properly triable in the county where the defendant resides. Comp. Laws 1913, § 7417. But the statute provides that "if the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county." Comp. Laws 1913, § 7418. And the appellant contends that inasmuch as the time for answering had expired, the defendant was not entitled to demand, and the court was not authorized to order, a change of place of trial. In support of this contention appellant cites *Irwin v. Taubman*, 26 S. D. 450, 128 N. W. 617. The case cited was considered and disapproved by this court in *McCarty v. Thornton*, 38 N. D. 551, 165 N. W. 499. And our views have undergone no change since *McCarty v. Thornton*, was decided.

But, the order changing the place of trial should be affirmed for another reason. In the case at bar the defendant defaulted. He failed to serve an answer, and he, also, failed to serve a demand for a change of venue. The defendant applied to the court to be relieved from his default. The court granted the application. The correctness of the ruling insofar as it relieved defendant from his default is not questioned. The sole complaint is that the court did not limit the relief to a permission to serve an answer. In determining defendant's application the court was acting under § 7483, Compiled Laws 1913, which provides that a trial court may "in its discretion and upon such terms as may be just, allow an answer or reply to be made, *or other act to be done*, after the time limited" by the provisions of the Code of Civil Procedure. The defendant, owing to his mistake, and inadvertence failed to do two acts: (1) to serve a demand for a change of place of trial; and, (2) to serve an answer. When the court found that defendant's failure to do these acts were legally excusable, it clearly had the power under the statute to relieve defendant from the consequences of his default, and to allow the acts in question "to be done, after the time limited." The order appealed from must be affirmed. It is so ordered.

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OSCAR NESS and Olaf Ness, Respondents, v. HANS M. LARSON  
and August Emmel, Appellants.

(170 N. W. 623.)

**Real property — owner of — offer by mail to sell — acceptance must be made in compliance with terms of offer — person offering released.**

1. Where the owner of real property makes an offer by mail to sell and states in such offer that "if you want to buy the land you must do so immediately, or else I will rent it out for the coming year," and the persons to whom the offer is made do not reply for seventeen days, the person making such offer is released, as the acceptance comes too late.

**Further offer made by owner — acceptance — meeting of minds of parties — contracts — what constitutes.**

2. Where a second offer is made stating that the parties may purchase on the same terms if they will take the owner's share of the rent, or, if they can

make some satisfactory arrangements with the tenant, and it appears that they never saw the tenant and did not know the amount of rent the owner was to receive, that there was no such offer and acceptance or meeting of the minds as constitute the making of a valid, binding, and enforceable contract.

Opinion filed June 1, 1918. On Rehearing January 7, 1919.

Appeal from district court, Renville County, *Leighton, J.*

Action to determine adverse claims to real property, to recover the possession thereof, and damages for the value of the use of the same.

From a judgment in favor of plaintiffs defendants appeal.

Reversed and dismissed.

*Halvor L. Halvorson* and *Nichols & Kelsch*, for respondents.

A person having an equitable estate in real property may maintain an action to determine adverse claims to said property. Comp. Laws 1913, § 8144; *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306; *Mitchell v. Black Eagle Min. Co.* (S. D.) 138 N. W. 159; *Woodward v. McCollum*, 16 N. D. 42; *Clapp v. Tower*, 11 N. D. 557; *Nearing v. Coop*, 6 N. D. 349; *Roby v. Bank*, 4 N. D. 156; *Mohen v. Lillestal*, 5 N. D. 331; *Warvelle, Vendors*, 2d. ed. 842; *Bucholz v. Leadbetter* (N. D.) 92 N. W. 830; *Sewell v. Underhill*, 197 N. Y. 168, 27 L.R.A. (N.S.) 233 and cases cited in note; *Selzer Lumber Co. v. Claffin*, 39 Cyc. 1611, 1612 and cases cited in the note; *Mitchell v. Knudtson Land Co.* 19 N. D. 736; *Orfield v. Harney*, 33 N. D. 568; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164; *Schmidt v. Johnston*, 31 N. D. 53.

The vendee in a contract for the sale of real property has an equitable interest in the land and is really the equitable owner of it. *Woodward v. McCollum*, 16 N. D. 42; *Clapp v. Tower*, 11 N. D. 557; *Nearing v. Coop*, 6 N. D. 349; *Roby v. Bank*, 4 N. D. 156; *Mohen v. Lillestal*, 5 N. D. 331; *Warville, Vendors*, 2d ed. 842; *Bucholz v. Leadbetter* (N. D.) 92 N. W. 830; *Sewell v. Underhill*, 197 N. Y. 168, 27 L.R.A.(N.S.) 233 and cases cited in note; *Selzer Lumber Co. v. Claffin*, 39 Cyc. 1611, 1612 and cases cited in the note; *Mitchell v. Knudtson Land Co.* 19 N. D. 736; *Orfield v. Harney*, 33 N. D. 568; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164; *Schmidt v. Johnston*, 31 N. D. 53.

Letters and telegrams may constitute a contract enforceable by specific performance. *Ibid.*

A court of equity having acquired jurisdiction will retain the same to determine all the rights of the parties to the subject-matter of the litigation. *Ibid.*; Pom. Eq. Jur. 3d ed. §§ 428, 1317; 16 Cyc. 499 and cases cited 1318.

This action being brought under the statute to determine adverse claims to real property, it was not necessary that plaintiff allege an offer to pay the purchase price of the land or to make tender thereof. *Powers v. Bank*, 15 N. D. 466; *Tee v. Noble*, 23 N. D. 225.

*J. E. Bryans*, for appellants.

In an action to quiet title the plaintiff must show some interest, or right of title in the land. This the plaintiff wholly failed to do, and the action should have been dismissed on defendant's motion. 36 Cyc. 773; *Herzog v. Atchinson R. Co.* 95 Pac. 898; *Loan Co. v. McGregor*, 149 N. W. 617; *Cement Co. v. Washburn*, 133 Pac. 153; *Thornhill v. Olson*, 31 N. D. 81.

An offer by mail to sell land upon certain fixed terms, and within a certain time, must be specifically accepted and acted upon, or the person making the offer is released. *Beisecker v. Amberson*, 17 N. D. 215; *Knutson v. Robinson*, 18 N. D. 12; *D. S. B. Johnson Land Co. v. Mitchell*, 29 N. D. 510; *O'Leary v. Schoenfeld*, 30 N. D. 374.

Plaintiff cannot recover in any event, because they failed to pay or offer, or tender the amount due under the contract. *Ackerman v. Maddux*, 26 N. D. 50; Comp. Laws 1913, § 7199; *Knutson v. Robinson*, 18 N. D. 12; *Ugland v. Kolb*, 23 N. D. 158; *Schumway v. Kitzmann*, 123 N. W. 325; *Nelson v. McCue* (N. D.) 163 N. W. 724.

FISK, District Judge. This action was brought under the statute relative to determining adverse claims to real property. The proper action, however, should have been for specific performance of a contract.

Plaintiffs, who reside in Renville county, entered into negotiations by correspondence with the defendant Hans M. Larson, a resident of Iowa, for the purpose of purchasing the S.W.  $\frac{1}{4}$  of § 8, township 163 N. of range 87 west, in Renville county, then owned by said Larson. The defendant Emmel was a tenant of Larson, upon the land in

question during the season plaintiffs claim to have purchased the same and he is interested in this lawsuit only to the extent of knowing to whom the landlord's share of the crop belonged, whether the plaintiffs or the defendant Larson. If plaintiffs have a valid contract then Emmel should have delivered this share to them; if not, it belonged to Larson who got it.

The defendant Larson denies that plaintiffs have any interest, title, or estate in the premises, and allege fee simple title in himself, so the all-important question for our consideration is as to whether or not the plaintiffs have such a valid and binding contract as could be enforced in an action for specific performance. If they have such a contract then they have some interest or estate in the property; if not, their action must fall. Several letters were exchanged between the parties and between bankers acting for the parties. The first of these letters was written on or about February 25th, 1914, making an offer of \$4,000 for the premises. This was followed by counter offers from Larson but we do not deem it important to set forth all of these letters as they were only preliminary to the negotiations. We will set forth the last of the letters which constitute the contract, if there was one.

On April 6th, 1914, Larson wrote as follows:

Ruthven, Iowa, April 6th, 1914.

Norma State Bank,

Norma, North Dakota.

Gentlemen:

Yours of the 2d received inclosing contract for deed on S.W. 8-163-87, which land I am selling to Olaf and Oscar Ness. I have written to you to send all papers to the Farmers Saving Bank, Ruthven, Iowa. Please do this and also draft for the \$1,000 paid down and I will then execute the contract and forward to you. I should like to have notes for the amounts of the deferred payments.

Awaiting your early reply, I am,

Very truly yours,  
Hans M. Larson.

On the same day Larson also wrote plaintiffs as follows:

Ruthven, Iowa, April 6th, 1914.

Olaf and Oscar Ness,

Dear Sirs:

I sent a letter to the Norma State Bank asking them to send notes and cash to the Farmers Savings Bank, Ruthven, Iowa. If you want to buy the land you must do so immediately or else I will rent it out for the coming year.

Yours truly,  
Hans M. Larson.

On April 23, 1914, Mr. Larson wrote as follows:

Ruthven, Iowa, April 23, 1914.

Mr. Oscar Ness,

New Port, N. D.

Dear Sir:

I am sure that you think I acted kind of strange by sending back your money and papers, but there was two weeks that I did not hear from you and it was getting late in the season that I was afraid that the land would have to be idle, so I rented it to Mr. Emmel. Now, if you want to take my share of the rent, or if you can make some satisfactory arrangements with Mr. Emmel, you may still take the land by sending the same papers back on same terms. That is the best I can do now. Perhaps you have not met Mr. Emmel. His address is A. W. Emmel, New Port, N. D. Hoping to receive a reply in the near future, I am,

Yours resp.,  
H. M. Larson.

It will be noted in the letter written by Larson to the plaintiffs under date of April 6th, that Larson required plaintiffs "to buy the land immediately, or else I will rent it out" and in his next letter written seventeen days later he refused to abide by his previous offer for the reason plaintiffs waited two weeks before doing anything towards accepting or complying with Larson's offer, and in the meantime he had rented the land. In the case of Ackerman v. Maddux, 26 N. D. 50, 143 N. W. 147, this court states the law as follows:



"This letter [being the offer to sell] was dated September 5, 1910, and was received by the defendant Maddux on September 6 or 7, 1910. On September 9, 1910, the defendant Maddux wrote a letter accepting the offer. It will be noticed that by its terms the offer demanded an acceptance by return mail, and there is no pretense that such was forthcoming. There was therefore no acceptance, and the offer is eliminated in law from the record and is as if it had never been made. That this is the settled law there can, we believe, be no controversy."

Following the law as thus laid down in this state it follows that the plaintiffs were too late in waiting 17 days before accepting, in view of the offer made requiring an immediate purchase, and we therefore hold that no binding contract had thus far been made.

The only other offer made by Mr. Larson was contained in the letter dated April 23d, 1914, and last above set out in full. In this letter Mr. Larson says, "Now if you want to take my share of the rent, or if you can make some satisfactory arrangements with Mr. Emmel, you may still take the land by sending the same papers back on same terms. . . . Hoping to receive a reply in the near future, I am." It appears that on April 29, 1914, these same papers were returned to Larson for his signature and on May 2d, 1914, the same were returned by Larson with the statement that he had decided not to sell. It appears from the evidence that plaintiffs never went to see Emmel in regard to what the terms of his lease were, or in regard to trying to make some satisfactory arrangements with him as Larson told them to do. They simply added into the contract for deed which they had prepared, the following: "This contract is made subject to a lease for the year 1914 with Aug. Emmel." Thus, without complying with the terms of the second offer made by Larson, they are in court attempting to assert title in themselves. It is evident that the plaintiffs did not even know what the terms of the lease between Larson and Emmel were because they sue in this action for one half of the crop raised by Emmel while as a matter of fact Larson was only to receive one fourth. Mr. Ness also testified that he thought he was entitled to one half the crop. We are agreed that there was no such unqualified acceptance of the second offer nor any such meeting of the minds as constitute a valid, binding, and enforceable contract. As was stated in *Beiseker v. Amberson*, 17 N. D. 218, 116 N. W. 94, "It is an elementary principle in the law

of contracts that an unqualified acceptance by letter in answer to an offer submitted by letter creates a binding contract in writing. It is also equally well established that any counter proposition or any deviation from the terms of the offer contained in the acceptance is deemed to be in effect a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone. In other words the minds of the parties must meet as to all the terms of the offer and of the acceptance before a valid contract is entered into. It is not enough that there is a concurrence of minds of the price of the real estate offered to be sold. If the purchaser adds anything in his acceptance not contained in the offer, then there is no contract. In this case there was an unqualified acceptance of the offer so far as the price is concerned. After that the acceptance advances terms by the writer as to the carrying out and execution of the contract that were in no manner contained in the offer. Among the new terms imposed by the plaintiff was the one asking the defendant to send the deed to one of two banks named in the letter. The defendant was entitled as a matter of law to have the cash price paid to him at Snohomish, Washington, where the offer was made; and without his consent he was not compelled to send the deed to any place or bank until the price was paid. If plaintiff had accepted the offer unconditionally, his right to a deed could have been made effectual only by a tender of the price to the defendant personally; and, by requiring defendant to send the deed elsewhere, a condition was attached to the acceptance which the defendant was not under any legal obligation to comply with."

After carefully reviewing the evidence in the case and particularly the correspondence between the plaintiffs and Larson relative to the purchase and sale of the property in question we are of the opinion that the plaintiffs acquired no right, title, or interest in said property and that the judgment of the district court must therefore be reversed.

The judgment of the district court is reversed and the case ordered dismissed.

GRACE, J. being disqualified, FRANK E. FISK, District Judge, sat in his place.

ROBINSON, J. (concurring). Defendants appeal from a judgment for the specific performance of an alleged contract to convey to the plaintiffs a quarter section of land in Renville county. The complaint avers that the plaintiffs have an estate and interest in the land and that defendants claim some estate adverse to the plaintiffs. Then in a bungling way it avers that Hans Larson owns the land. Its value is \$5,000. The yearly value of its use and occupation is \$550. The value of half the crop grown on the land during the year 1914, is \$550. That on April 1, 1914, Larson made a written contract to sell the land to the plaintiffs for \$4,000, which they agreed to pay, and that since then defendant August Emmel, has been in possession of the land as tenant of Larson.

The relief demanded is that defendants set forth their adverse claim and that it be adjudged void and that plaintiffs recover possession of the land with \$550, for the use and occupation of the same. The complaint states neither a cause of action for specific performance nor the determination of an adverse claim. However, it shows that Larson owns the land and the plaintiffs have no title to it. The evidence shows the plaintiffs have been trying to bargain for the land at \$4,000, but there is no showing of any completed contract. The bargain was all by letters which contain offers, counteroffers and modifications, but there is no showing of a complete acceptance of any offer and a full compliance with other conditions. There is a written contract signed by the plaintiffs but it is not signed by defendant Larson. To copy the correspondence would make needless expense and avail nothing. But even if there were proof of a legal contract (which there is not) it does not follow, as a matter of course, that the court should decree a specific performance of the same without some facts and circumstances appealing to the conscience of the court. The contract must be just and fair and the remedy must not be harsh in its operation upon defendants. Under the statute specific performance may not be enforced against a party to a contract if he has not received an adequate consideration for the contract, and if it is not as to him just and reasonable. Comp. Laws, § 7198.

In this case it appears the quarter section of land is worth \$5,000. and for the crops of three years, the court allows \$1,000. In December, 1914, when the crop of that year was assured, the plaintiffs sued

to get the crop and the land at \$4,000. On May 29, 1917, the plaintiffs took judgment for the specific performance of the contract with credit for \$1,000 and interest on account of the crops produced on the land during the three preceding years, and it was further adjudged that Larson is not entitled to any interest on the sum of \$1,000, of the purchase price for which a cashier's check was tendered in April, 1914.

Thus without having paid a dollar the plaintiffs want a quarter section of land at \$1,000 less than its value. A quarter section worth \$5,000 and crops for three years, \$1,000 and annual interest on the value of the crop in each year. And they refuse to pay interest for three years on the \$1,000 check though Larson had never offered to receive such a check. Manifestly there is not justice or equity in such a deal and it is contrary to the first principles of equity.

Judgment reversed and action dismissed.

#### On Rehearing.

PER CURIAM. A rehearing was ordered in this case. Mr. Justice Grace, being disqualified, and District Judge Fisk, who sat in his place upon the first argument being ill, Judge Nuessle of the sixth district was called in and sat as a member of the court upon the re-argument. After careful consideration, we are of the opinion that the conclusion reached in the former opinion is correct. We are, also, of the opinion that there is a reason not mentioned in the former opinion for holding that the plaintiffs have failed to establish that they have a contract for the purchase of the premises involved in this suit. The former opinion refers to a letter of April 29th, 1914, as an acceptance of an offer. This letter is, in our opinion, not an acceptance, but rather a counter offer. It makes the acceptance conditional upon the defendant Larson, furnishing or paying for an abstract of title. This might have meant a considerable expense so far as defendant was concerned, and it was a new condition,—one not referred to in any of the former correspondence.

We, also, believe in view of the fact that the defendant in his answer has affirmatively set up a fee title in himself, and has prayed that title be quieted in him, that judgment should be entered in favor of the

defendant Larson, that he is the owner and entitled to the possession of the premises; and that his title be quieted against all claims of the plaintiffs. It is so ordered.

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**ALBERT M. POWELL et al., Respondents, v. INTERNATIONAL HARVESTER COMPANY OF AMERICA, Patrick D. Norton, Mary E. Norton, and Herman Rutten as Sheriff of Ramsey County, North Dakota, Appellants.**

(170 N. W. 559.)

**Conveyance of land — deed — to one who was agent of the Harvester Company — evidence — agent did not take deed or hold land in trust for company.**

1. An action was brought by one Powell against the International Harvester Company of America, Patrick D. Norton, and Mary E. Norton, et al., for the purpose of having a deed to certain land declared to be held in trust for the International Harvester Company. The deed was executed by the owner, one Largent, to Patrick D. Norton, who was the collection agent of the Harvester Company. *Held* that Patrick D. Norton did not take the deed nor hold the land, therein described, in trust for the International Harvester Company.

**Fraud in transfer of land — question of — one not party to transfer — cannot be asserted by — a stranger is in no position to assert fraud — must be by one of parties.**

2. In a transfer of certain land by deed from Largent, the owner, to one Patrick D. Norton, it is held that if fraud existed in procuring such transfer, Powell, the plaintiff, who had a mortgage upon the land conveyed by the deed, which mortgage was being foreclosed, not being a party to the conveyance of the land by deed from Largent to Norton, is in no position to assert fraud. If there were fraud in the procuring of the deed from Largent by Norton, it is a matter which can only be asserted by the parties to the transaction, in this case, Largent.

Opinion filed November 18, 1918. Rehearing denied January 8, 1919.

Appeal from the District Court of Ramsey County, North Dakota, Honorable *C. W. Buttz*, Judge, wherein *Cowan, J.*, made findings and order for judgment. Reversed and remanded.

*M. H. Brennan* (*E. T. Burke*, on oral argument), for appellants.

A stipulation and settlement of matters involved in pending litigation cannot be arbitrarily withdrawn by one of the parties in order to enable him to make some different claim to that expressed and acknowledged in such stipulation and settlement, without returning or offering in good faith to return the consideration. *Schaetzel v. Huron* (S. D.) 60 N. W. 741; *Deere & W. Co. v. Hinckley* (S. D.) 106 N. W. 138; 31 Cyc. 525; *Northern P. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233.

An intervener must have an interest in the subject-matter of the litigation, or he has no right to come in. In the transfer of land, fraud can only be claimed by an interested party to the transaction. *Carlson v. Wyman* (Mich.) 155 N. W. 418; *Sutton v. Consol. Apex Min. Co.* 12 S. D. 576, 82 N. W. 188; *Crouch v. Dakota, W. & M. R. R. Co.* 22 S. D. 263, 117 N. W. 145; *Re Kaeppler*, 7 N. D. 307; 14 Am. & Eng. Enc. Law, 148; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *De Grasse v. Verona Min. Co.* (Mich.) 152 N. W. 242.

Where a party acts with full knowledge of all the facts he cannot base a claim of fraud in a transaction to which he was not a party and reap a benefit. *Knight v. Linzey* (Mich.) 45 N. W. 377.

*C. J. Adamson* and *H. S. Blood*, for respondents.

Appellants claim that until Largent repays to Norton the money received, neither plaintiff nor Largent can be heard to question the fraud. Such is not the rule in equity.

"It would be a mockery of justice to say that when a man is check-mated in his attempt to perpetrate a fraud, he may still recover from the object of his unlawful aggression his outlay in the furtherance of that attempt." *Nichols v. Russell* (Mo.) 123 S. W. 1023.

GRACE, J. Appeal from a judgment of the district court of Ramsey county, North Dakota, Honorable C. W. Buttz, judge.

This is an action to cancel and reform a certain deed given by one John Largent to Patrick D. Norton to Lots 1 and 2, and the S.  $\frac{1}{2}$  of the N.E.  $\frac{1}{4}$  of section 1, township 157, north of range 63 west. The action is for the further purpose of compelling specific performance of a certain contract alleged to have been entered into with reference to said land between the International Harvester Company of America and the plaintiff. The cancelation of the deed is asked upon the ground

of fraud alleged to have been perpetrated by Patrick D. Norton upon John Largent in procuring the said Largent to execute the deed in question to said land, Largent at the time of the execution of the deed being the owner in fee of said land, subject to certain encumbrances. The complaint fully sets out the cause of action along the lines above dictated, and further sets forth the alleged false and fraudulent representations of Partick D. Norton to John Largent at the time of the execution and delivery of the deed in question. It also alleges the ownership of the land in dispute in Largent; the giving of the mortgage thereon to Powell and the default and foreclosure of the same and the sale by foreclosure on May 4th, 1903, and the purchase of the land at foreclosure sale by Powell. It alleges the judgment in favor of the Warder, Bushnell, and Glessner Company against Largent on January 20, 1896, for \$131.78 in the justice court of Peoria, Illinois, and the assignment of said judgment to the International Harvester Company. Largent filed a complaint in intervention wherein he admitted the existence of the judgment against him above referred to. The intervener in substance alleges that in the spring of 1904, Patrick D. Norton, then and sometime prior thereto, was the traveling representative or agent of the International Harvester Company of America and so represented himself to be to the intervener and demanded payment of the judgment; that he told Norton that he was unable to pay the judgment thereupon Norton asked the intervener to give a deed to the International Harvester Company of America to the real property involved herein, in order that the International Harvester Company might redeem from the Powell foreclosure; that if the intervener would execute said deed, the International Harvester Company and Patrick D. Norton would cancel, satisfy, and discharge the judgment then held by the Harvester Company; that the intervener supposed and Norton represented to him that the deed ran to the Harvester Company, but notwithstanding the agreement the intervener has been informed and verily believes the deed ran to the defendant, Patrick D. Norton individually; that in truth and in fact said deed was delivered for the International Harvester Company of America, and not for Patrick D. Norton individually; that the judgment against intervener has not been canceled or discharged. The intervener alleges the equity in real estate to be of the value of \$2,200.

It is further alleged redemption from the Powell foreclosure was made by virtue of said deed and that Mary Norton, sister of Patrick D. Norton, to whom the land was transferred by Patrick D. Norton, took the same with full knowledge and notice of all the circumstances under which the deed had been obtained. The intervener did not appeal from the judgment.

The International Harvester Company, in substance, in its answer states that the transfer of any real estate from John Largent to Patrick D. Norton was made to Norton personally; that defendant admits entering into the written agreement, Exhibit A, with Powell and alleges it has carried out its part of the agreement; that it had deposited in the Ramsey County National Bank at Devils Lake, an assignment of the judgment mentioned and described in Exhibit A and demanded the sum of \$130, balance due under contract which Powell refused and still refuses to pay and alleges the payment by Patrick D. Norton to John Largent of the consideration agreed to be paid for the said real estate.

Patrick D. Norton for his separate answer admits that he was collector for the International Harvester Company and did, on the 22d day of April, 1904, call upon John Largent and requested payment for the judgment heretofore mentioned. He admits the execution and delivery of the deed from Largent to him of the land in question, and denies that the International Harvester Company had any interest in the sale, conveyance, and transfer of the land from Largent to him. He alleges the sale, transfer, and conveyance of all his right, title, and interest of the premises to Mary E. Norton and the redemption from the foreclosure sale by paying the sheriff of Ramsey County, North Dakota, \$381.32, and alleges that Mary E. Norton had no notice or knowledge of equities on the part of the plaintiff. He alleges payment to John Largent of the consideration in full agreed to be paid by the defendant to Largent as purchase price of said real estate. The International Harvester Company also interposed an answer to the complaint in intervention, which, in substance, is largely similar to the answer of the defendant. The facts, concisely stated, are as follows:

Largent was the owner of the land in question. He mortgaged the same to Powell. Powell foreclosed and the sale was had May 4th, 1903. Time for redemption expired April 27, 1904. Patrick D.



Norton received a deed for the land from Largent and thereafter deeded it to his sister, Mary E. Norton, who made redemption by paying the required amount of money to the sheriff as aforesated. Warder, Bushnell and Glessner Company had judgment in the amount hereinbefore stated against Largent. The Harvester Company admits the execution and delivery of the deed to Patrick D. Norton and denies it had any interest in the sale, conveyance, and transfer of the land to Patrick D. Norton. The plaintiff claims Patrick D. Norton was the agent of the International Harvester Company and that the transfer to him was for the benefit of the Harvester Company. It is claimed by plaintiff that Patrick D. Norton represented to Largent that if Largent would give him a deed for the land, he would satisfy the judgment recovered against him by the Warder, Bushnell, and Glessner Company. The judgment was never satisfied.

The plaintiff claims that Norton charged the International Harvester Company the \$1 which he paid to Largent at the time the deed was acknowledged. In this we think the plaintiff is mistaken. The testimony clearly shows that Norton paid Miller, the notary public who took the acknowledgment, \$5 for his services, and this was not charged to the International Harvester Company but was paid by Norton personally. Miller testified that, at Norton's request, he advanced \$1 which Norton paid to Largent. It is clear that the \$1 paid to Largent by Norton was not charged to the International Harvester Company. Norton made two trips to Largent's. The first trip he was driven there by Dr. McNaughton, veterinarian, who, in his testimony, says his charges were \$2.50, and he signed a voucher to the International Harvester Company for \$3.50. Whatever the extra \$1 was for in such voucher, it is clear from the testimony of Miller, who is plaintiff's witness, that it is not the \$1 that was paid by Norton to Largent, and it is clear that the \$1 paid by Norton to Largent, which he procured from Miller, was never charged to the International Harvester Company. It is also clear that the first trip made by Norton to Largent's in company with McNaughton was for the purpose of looking after the collection of the judgment above referred to, and in doing this he was looking after the Harvester Company's business as it was looking after the collection of the judgment, and there seems to be no irregularity in charging the expense of the trip to the Harvester Company.

The fact that this \$3.50 voucher was charged to the Harvester Company, in no manner shows or tends to show that Norton was acting for the Harvester Company when he took the deed of the land in question to himself.

The agreement between the International Harvester Company of America and A. M. Powell is as follows:

"This agreement between International Harvester Company of America and A. M. Powell is to the effect that for \$150 cash the judgment against John Largent dated January 20, 1896, for \$131.28, justice court, Peoria Co., Illinois, is to be assigned to George W. Mooers, and if any quitclaim deed or other deed from John Largent to this company should be recorded at Devils Lake, North Dakota, on or before May 6, 1904, the land so conveyed is to be quitclaimed back to George W. Mooers. This refers to lots 1 and 2 S.  $\frac{1}{2}$  of N.E.  $\frac{1}{4}$ , section 1, township 157, range 63, and in consideration of the above \$150 of which \$20 is received to-day, the company agrees to not in any way hinder issuance of sheriff's deed on above land by virtue of the foreclosure proceedings by A. M. Powell which entitle him to sheriff's deed by May 6, 1904.

"If any quitclaim deed has been taken by our representative to this company and not recorded such instrument will be surrendered to George W. Mooers. The assignment and deed, if any, are to be sent to Ramsey County National Bank at Devils Lake, North Dakota, and to be surrendered to George W. Mooers or A. M. Powell on payment of the balance which is \$130. Said deed if any to read to George W. Mooers as grantee.

"Signed by the Company per collecting agent Larson and by Powell."

In the trial court, the judgment is in favor of the plaintiff. From the judgment Patrick D. Norton and Mary E. Norton appealed. The intervener did not appeal and his claims as set forth in his complaint of intervention are not at this time before the court. Mary E. Norton made redemption of the land by paying to the sheriff of Ramsey county, the sum of \$381.32, and received a sheriff's certificate of redemption and thereafter took possession of the land and had it cropped. Her testimony shows that she agreed to pay Patrick D. Norton \$500 for the land and that \$300 of the same was paid by her making a

loan on a piece of land near Bartlett, of the proceeds of which Patrick D. Norton retained \$300 and she received \$200.

From the foregoing it appears that the entire amount of the foreclosure was paid to the sheriff by Mary E. Norton for the redemption from the Powell mortgage foreclosure. It is apparent therefore that all Powell had to do to get his money and all of it, was to call at the sheriff's office and receive the same. He would then have no further interest in such land by reason of the mortgage nor the foreclosure thereof, and would no longer be a creditor of Largent for Largent's obligation to him would have been fully paid by the redemption.

If Patrick D. Norton perpetrated a fraud upon Largent, and procured the deed from Largent to himself by means of false and fraudulent representations, that was a matter which is personal between Largent and Norton and of which the plaintiff cannot be heard to complain, and especially not since the record clearly shows that the amount of money necessary to redeem from his foreclosure has been paid in to the proper place, the sheriff's office for the purpose of redeeming from the foreclosure. It is clear that Largent did not give the deed to Patrick D. Norton in order to defraud the plaintiff. The plaintiff, in any event, could not be defrauded out of his mortgage and there was no attempt to do so, the full amount of the money necessary to redeem from the mortgage having been properly paid. When Largent gave the deed to Patrick D. Norton, he transferred to him the legal title of the land. If he were induced to do this by a fraud, that is personal to him and he alone may complain, unless the transfer was made in order to defraud creditors when a different question might arise. Powell was in no manner a party to the deed and is in no position to assert fraud, and, in this case, he cannot do so. The matter of fraud in this case is between Patrick D. Norton and Largent and then only, unless it should appear that Mary E. Norton had notice or knowledge of the fraud, if any, and as the record now stands, it does not so appear. Her knowledge or notice of fraud would become material only upon that issue being presented as between Largent and Patrick D. Norton. It does appear that she purchased the land from Patrick D. Norton for \$500, that he was instrumental in procuring a loan for her on other lands which she owned and part of which money was paid upon the purchase price, and that he acted for her

in looking after the payment of the Powell mortgage, that is, by making the redemption, in her name, from the foreclosure sale.

The 8th, 9th, 10th and 11th findings of fact of the trial court relate to the alleged fraud of Patrick D. Norton in procuring the deed to said land from Largent. Upon these must rest principally the conclusions of law at which the court arrived. Upon examination of the conclusions of law reached by the court, it will be noticed that the court based its conclusion solely upon the question of fraud. In order to demonstrate this more clearly, we will set out at length the findings of the court in this regard. They are as follows:

"That the deed to the premises heretofore described of John Largent, intervener, to the defendant, Patrick D. Norton, dated April 27th, 1904, recorded in book 170 of deeds on page 237 in the office of the register of deeds of Ramsey county, North Dakota, was obtained by fraud and misrepresentations and that the same is void and canceled of record.

"That the defendant, Mary E. Norton, was not an innocent purchaser of the premises described in said action from the defendant, Patrick D. Norton, and that the deed for the said premises from the defendant, Patrick D. Norton, to the defendant, Mary E. Norton, dated May 4th, 1904, and recorded in book 190 of deeds on page 485 in the office of the register of deeds of Ramsey county, North Dakota, should be canceled of record."

The only other conclusion of law reached by the court is that Albert M. Powell is entitled to sheriff's deed based upon the foreclosure of the mortgage and that the filing of the certified copy of the judgment in this action in the office of register of deeds would have the effect of canceling of record the said deed of Largent to Patrick D. Norton and the deed from him to Mary E. Norton. It is clear from these conclusions that the court considered no question except that of fraud. Its conclusions of law, as we have seen, relate almost wholly to this subject and, as we view the matter, its conclusions are entirely wrong, measured by the result at which the court arrived and the party benefited, that is, A. M. Powell. The court's conclusions might be right if the action were being prosecuted by Largent against Patrick D. Norton, if they were supported by competent testimony. Powell is in no position to raise the question of fraud, hence he can receive no

benefit from the conclusion of law at which the court arrived. The court finds, in its 11th finding of fact, that the International Harvester Company of America did not authorize Patrick D. Norton to take or accept a deed of conveyance of the premises of the intervener and did not accept the same in payment of the judgment in question, and had not released the intervener from the payment of the judgment. Assuming this to be true, and it being conceded that Patrick D. Norton took the deed in his own name, he could not be said to hold it in trust for the Harvester Company. He claims to have taken it on his own account and his own responsibility and to himself individually. Largent also signed up a stipulation and acknowledged it to that effect, and also stipulated to dismiss this action by way of intervention.

The Harvester Company, in its answer, claims that Norton bought it substantially as he alleges. Under these circumstances and considering all the testimony including that of Largent, and taking into consideration the contract, exhibit A, between the International Harvester Company and Powell, we do not believe there was any resulting trust in favor of Powell; neither do we believe the plaintiff is in position to ask for specific performance of that contract, which relates only to an assignment of the judgment, and provides, further, that any quitclaim or any other deed from Largent to the company should be recorded at Devils Lake, North Dakota, on or about May 6th, 1904, the land so conveyed to be quitclaimed back to George W. Mooers. No such deed appears to ever have been delivered or recorded. This referred to the land in question. The further provision was to the effect that if any quitclaim deed had been taken by representatives of the company to the company and not recorded, such instruments would be surrendered to George W. Mooers. There is no evidence that any such deed was ever taken to the company. There is no evidence to show that the International Harvester Company ever received a deed to the land, or any evidence to show that any of its representatives took a deed to the company. As we view it, this is not such a contract as may be enforced by specific performance because of the uncertainty of the facts. There are many disputed questions of fact in the case. This being true, the contract, we do not believe, is subject to be enforced by specific performance. Courts of equity will neither decree nor enforce specific performance of con-

tracts requiring, first, the determination of questions of fact. Specific performance ought not to be decreed unless the contract is definite and certain in its terms. Every material element of the contract should be certain and the minds of the parties should have met and agreed upon all the material terms of the contract, and no material part of the contract should be in dispute. In the case at bar the first disputed question is whether the deed in question was made to Patrick D. Norton individually. Plaintiff seriously contends it was not. Defendant just as seriously and strongly contends that it was, and finally produces the written admission of Largent to that effect which was acknowledged before a notary public.

It also appears that Largent entered into a written stipulation dismissing this action by way of intervention. Under these conditions, specific performance ought not to be decreed. There is evidence in the record that at the time Patrick D. Norton took the deed to the land, he considered he had made a profit of \$1,000 by the transaction. Largent in his complaint in intervention claimed there was equity in the land of \$2,200. It may be assumed that Norton would make a profit of somewhere between \$1,000 and \$2,200, this based upon the value of the land at the time of the transaction. The land, of course, may be worth a great deal more at this time. It is also clear that if Powell should be permitted to prevail, he would make the same profit. The amount of money due on Powell's mortgage which was foreclosed is in the hands of the sheriff for him and has been since the time hereinbefore stated. He cannot be a loser as a creditor. What he does lose is the opportunity to acquire the value of the equity of such land without giving any consideration therefor. We are clear that Powell is in no position to raise the question of fraud, it being a matter personal to Largent, nor can the court of equity decree specific performance of the contract, exhibit A, by reason of the uncertainty and indefiniteness of its terms and the several disputed question of fact relating to the contract. Largent has not taken an appeal from the judgment to this court, and for that reason we cannot determine his rights in the matter, if any.

Judgment appealed from is reversed and the case is remanded for further proceedings in harmony with this opinion. The appellant is entitled to recover statutory costs on appeal.

CHRISTIANSON, J. (concurring specially). I concur in the conclusion reached by Mr. Justice Grace; but I desire to supplement, to some extent, the statements of facts contained in the opinion prepared by him. One John Largent owned the land involved in this action. He mortgaged it to the plaintiff, Powell, who foreclosed the mortgage and purchased the land at foreclosure sale, on May 4th, 1903, for the sum of \$340.47. The defendant, Patrick D. Norton, was a collector for the International Harvester Company. As such collector he called upon Largent on April 27th, 1904, with regard to a judgment which the International Harvester Company had for collection against Largent. This litigation grew out of the transaction then had between Norton and Largent. There is some conflict between Largent and Norton as to what was said at the time. Norton testifies:

"I drove out to the McIsaacs farm; I drove out there for the purpose of seeing Largent in regard to the payment of a judgment that the International Harvester Company had to collect; I met Largent there and asked him if he could pay that judgment, he said he couldn't pay it, he didn't have the money to pay it then; I asked him if he repudiated the judgment; 'No' he said he didn't; and then I asked him if he would confess judgment in this state—the judgment was from Illinois—'No,' he said he would not confess judgment he didn't want to have any judgments against him; then I asked him if he would at any time in the future pay anything on the judgment; he said 'Yes' that if I let it go until fall he would pay something on the judgment. Before that I asked him if he had any property, and he said 'No' he didn't have any property at all of any kind; and I asked him, None at all? 'No,' he said he didn't have any whatever. After he said he would pay something on the judgment in the fall if I would let it go I asked him if he didn't have some land up north of Starkweather at one time, and he said, 'Yes,' I says, What did you do with it? 'Well,' he said 'that was sold under a mortgage,' and he says, 'That is gone; I haven't got anything to do with it,' he says 'I can't do anything, I can't pay the mortgage;' I says, When was it sold? 'Well,' he said, 'it was sold on,'—he didn't know just when. Well I says, Did you ever try to redeem it? 'Well,' he said 'Yes' but he couldn't raise any money because his wife would not sign with him, I asked him why? 'Well,' he said, 'she was living in'—well, I wouldn't say Wisconsin or

Illinois but in one of those states— and that she had never lived with him and she wouldn't sign, they were not living together. Well, I says, now the time for redemption on that mortgage is near up as I happen to know that, I said, and I asked him if he was going to redeem it, 'No' he said as before he couldn't do anything with it.

"Now, I will tell you, I said, I live in Devils Lake and I am an attorney there, and I might be able to get something out of that land if you gave me a deed to it. I don't know, I said, that I can do anything with it. I says where does your wife live and what is her name and address and he told me and gave her name and address; I says, I may be able to arrange it so I can get something out of it if you give me a deed, and then I said would you just as soon give the land to me as to Powell? He said, 'Yes, I haven't got any claim on it,' that is what he said he didn't have any claim on the land or didn't expect to get anything out of it. Now, I says, I will tell you, Largent, if you give me a deed to the land, and I can get something out of it, so I can make something on the deal, I will give you twenty-five or fifty dollars or seventy-five dollars, out of the deal, and you can have that money for yourself, and pay it on the judgment or do what you please with it, He says, 'all right,' and I says, to show you I am all right, ask McNaughton or McIsaacs regarding me; I have lived in the county a long time, and they will tell you what I say will be all right, 'Yes,' he says, 'I will give you a deed to the land;' and I then went over to the buggy and made out a quitclaim deed."

Largent was sworn as a witness in behalf of the plaintiff. On his direct examination he testified as follows with respect to the conversation; He (Norton) said he was collecting for those people (Warder, Bushnell & Glessner Company) and he asked me if I didn't have an interest in a claim there in this county somewhere and I told him I didn't know whether I did or not, "I should have an interest in a claim here," or something like that.

Q. What did he mean by a claim?

A. A farm.

Q. What else did you say?

A. And he asked me if Powell didn't have an interest in it in some way; and I told him, well, he did; that he had furnished the



money for me to prove on the claim, when I proved up, and I never paid him back, and he said he would foreclose, or had foreclosed, or something like that I think.

Q. Norton told you that Powell had foreclosed?

A. Yes, or was about to, something like that; and he said if I would give those people a deed that he would redeem or turn me in my mortgage, my judgment notes, or something like that.

Q. What people?

A. The Warder, Bushnell, & Glessner Company or the International Harvester Company. It is all the same I guess is it not?

But on cross-examination he testified in answer to questions put to him by Mr. Norton.

Q. You remember me asking you where your wife was?

A. Yes, sir.

Q. And do you remember you told me that the reason you couldn't loan any money on the land was because your wife would not sign with you?

A. Yes, sir.

Q. You remember me asking you where your wife was and telling you I would write to her?

A. Yes,

Q. And if I got the matter straightened up I would pay you fifty or seventy-five dollars out of it, if I got it straightened up so I would get something out of it; wasn't that the conversation?

A. Yes, I believe that is right.

Largent further admitted that he subsequently gave an order to one Gunberg, upon Mr. Norton requesting Norton to pay "the \$50 still due me on my land deal with Mr. Norton." Largent further admitted that when he gave the order to Gunberg he had some conversation with him with respect to the land deal. The following questions were propounded to and answers given by Largent with respect to the conversation had between Largent and Gunberg:

Q. And did he (Gunberg) ask you the further question, what was

Norton paying you for the deed to this land, and didn't you answer him and say that he was paying \$60?

A. I believe there were such words.

Q. He was to pay \$60?

A. \$60 or \$70 I said.

Alex McIsaacs, one of the subscribing witnesses to the deed executed by Largent was called and testified as a witness on behalf of the plaintiff. He testified that he was working in the field with Largent and was called over and signed the deed as a subscribing witness. He further testified that he heard no reference made to the International Harvester Company and that Norton stated that there would be a chance for Largent to make some money out of the land. McIsaacs further testified that Norton said that there was a chance for him (Norton) to make something out of it.

As bearing upon the question whether the deed was actually taken to or for the benefit of the International Harvester Company attention is called to the fact that Norton charged up the expense, for the livery incurred on the first trip, to the Harvester Company. It is true Norton did charge this expense to the Company. But it is also true that Norton had received specific instructions from the general collection agent to attend to this claim, and the trip was apparently necessary to carry out such instructions. The evidence shows that before making the trip Norton had endeavored to get the plaintiff Powell to take up the judgment against Largent, but without success.

Larson, the general collection agent of the International Harvester Company testified that he had a conversation with Norton regarding the Largent claim. Larson testified:

"The conversation was about this claim, about this judgment, and Norton called my attention to the man Largent having lost his land by foreclosure and the time for redemption would expire soon, which was a well-known fact, and he wanted to know if the Company would not furnish the money to redeem provided we could get the right to redeem. We then talked some about the title and he said that the Powell mortgage was one signed by him alone—by Largent alone; and he further said that he had a wife, and when I asked him why she didn't sign it, he said he didn't know, and we talked along that line

about the claim; and I told him that the company didn't want to have anything to do with real estate; that I had no authority to invest in real estate for the company; that we didn't want this land and I didn't care how cheap it was or how safe it was, I told him that I would have nothing to do with it; that was understood."

The record is silent as to whether this conversation was in person, or by telephone. But it is a reasonable deduction that it was by telephone as there is reference to telephone conversations between Larson and Norton with respect to the Largent claim. And Larson also testified that it was customary for him to talk over matters with his various collectors over the long-distance telephone almost every evening. The record also shows that Norton made a written report to Larson. The report is dated April 27th, 1904, and was offered in evidence by the plaintiff. In this report, Norton, said:

"It is a difficult matter to get in a position where we can dictate payment or get anyone to take up our claim. It is impossible for us to get judgment against this man before the time for redemption expires. As long as he will not confess judgment, we cannot have judgment entered within about thirty days, so there is no use suing him now. He has no property whatever except on equity in this land."

The report then goes on to discuss the value of the land, its location, the amount of encumbrance, and the amount necessary to redeem, and inquires whether the company would advance the money required to make redemption. The report concludes as follows: "As far as I can see it is perfectly safe. While I cannot get Mr. Largent to confess judgment, I can get him to give me his rights to the land for a small consideration. Advise me as to what you think of advancing the required amount to redeem. Think now this is the only way the company can get anything out of this difficult claim."

Plaintiff also asserts that Norton charged up to the International Harvester Company the \$1, which he paid to Largent at the time of the acknowledgment of the deed. This assertion is not sustained by the record. On the contrary the undisputed testimony is to the effect that Norton paid Miller, the notary public who took the acknowledgment, \$5 for his services, and that this expense was not charged to the Harvester Company at all, but was paid by Norton personally. And Miller testified that he, at Norton's request, advanced the \$1, which

Norton paid to Largent. These seem small matters, and yet they constitute some of the main propositions advanced by plaintiff in support of the findings of the trial court.

All the witnesses testified that Norton in no manner concealed the deed or any part of it, but handed it over to Largent for inspection before it was executed. Norton also testifies, and Largent admits, that at one time in talking over the land deal, Norton suggested that Largent go and consult some attorney with respect to his rights in the matter, and that he (Norton) would reimburse Largent or rather his employer for the time lost in so doing. These facts speak for themselves.

Let us examine the record and see what it shows with respect to Powell: He held the sheriff's certificate of foreclosure. Norton went to see him with respect to the Largent judgment. Powell testifies that he informed Norton that he had submitted the matter to his attorney and had been advised that the judgment would not constitute a lien against the land. He admits that he went out to see Largent, and was informed by him that he (Largent) had executed and delivered the deed involved in this controversy. According to Powell's testimony Largent said: "I signed a deed for the International Harvester Company." Either on that same day or the day following Powell went to Grand Forks and obtained the contract set out in the opinion prepared by Mr. Justice Grace. Powell admits that he in no manner informed Larson (the agent of the Harvester Company) of the information which he had received from Largent. And Larson testifies positively that he had no knowledge of the fact that any deed had been given by Largent at all. Both Larson and Powell agree that Powell said he wanted to buy the judgment against Largent. Powell prepared a proposed contract. This proposed contract is not before us, but apparently some changes were made before it was signed. Larson testifies that Powell wanted a provision in the contract to the effect that if Largent had executed a deed running to Norton instead of to the Harvester Company that then the Company would have Norton convey to Mooers. Larson testifies:

"My best recollection is that Powell wanted some provision in there, and I was trying not to get it in—that is, to keep it out—and I told him that if a deed taken to him (Norton) personally was none

*of our business, that we had nothing to do with it.* Q. That is, if P. D. Norton had taken a deed to himself personally you didn't want anything to do with it, because that was his own affair? A. Yes sir."

Powell, however, denies that he requested any provision providing for the contingency of a deed having been taken to Norton.

Powell brought the present action to enforce specific performance of the contract against the Harvester Company, and to reform the deed given by Largent to Norton, so as to make the Harvester Company the grantee in such a deed. Obviously Powell's rights in this action depend upon and are measured by the contract. The methods by and the conditions under which the contract was obtained have already been set forth. What was the situation when the contract was executed? On the one hand we have Powell desirous of getting the contract without disclosing to Larson anything with reference to what Largent has told him about the deed. Larson knows that Norton has been endeavoring to collect the claim or get someone to take it up, but has been unable to do so. And yet here comes Powell all the way from Devils Lake to Grank Forks to get a chance to buy the judgment. He proposes and talks purchase of the judgment, but prepares and insists upon a contract referring to and providing for the contingency of a deed having been given by Largent. The situation is somewhat unusual to say the least, and it would have been strange indeed if Larson had not become somewhat cautious, and he evidently did. While there is dispute as to what was said, and Powell denies that he requested a clause in the contract making reference to a deed having been taken to Norton, it does appear that the proposed contract prepared by Powell was not executed as prepared. According to a statement made by Powell, in his testimony, Larson apparently went to the trouble of discussing the matter with Attorney Sorley before signing any contract. Larson knew nothing about the deed, and Powell carefully refrained from making any disclosure with respect thereto. Larson however must have had in mind the recent conversation with, and the report from, Norton. He knew that he had informed Norton that the Company would not advance the money to make redemption and would take no real estate regardless how cheap it might be. He also knew that Norton considered it a desirable deal, one both safe and profitable. So it is indeed quite likely true when

Larson testifies. "When I made Exhibit 4 (the contract) I had in mind all the time that a quitclaim deed might have been taken by Norton personally; and I also had in mind that a deed might have been taken to the company." It is therefore quite likely that Larson desired the contract to be so worded as to exclude any obligation on the part of the company to obtain a conveyance of the land if a deed had been taken which did in fact run to Norton as grantee. That is, that he insisted that the only condition under which the Harvester Company would agree to convey was that a deed had in fact been taken "to this company." And it seems to me that the language of the contract obligates the Harvester Company to convey only in case a deed has been taken directly to that company. Of course, if the language of the contract is deemed ambiguous, it should be interpreted in light of the circumstances under which it was made and the matter to which it relates. Comp. Laws 1913, § 5907. And the terms of the contract will be deemed to extend only to those things concerning which it appears that the parties intended to contract. Comp. Laws 1913, § 5908. In any event I do not believe that the plaintiff is entitled to a conveyance of the land under the terms of the contract which he seeks to enforce. And inasmuch as plaintiff's action is founded solely upon, and seeks to enforce, such contract, it seems entirely clear to me that he has failed to establish the cause of action which he claims to have against the defendants. And apparently the trial court found it impossible, or at least it was unwilling, to find that the plaintiff had established such cause of action, because it did not decree a specific performance of the contract and a reformation of the deed. The findings and judgment ignore the theory of the case, and the issues framed by the pleadings. The findings are to the effect that the deed from Largent to Norton is a nullity, and the judgment is that this deed and the deed from Norton to Mary E. Norton be canceled. This judgment disregards the pleadings and the issues tendered, and its effect is to completely annul all rights of the Nortons, the Harvester Company and Largent in the land, and to give Powell title thereto under his foreclosure. Not only will it do this, but it will in effect relieve Powell from all liability to pay the sum which he agreed to pay to the Harvester Company for an assignment of the judgment.

It will also give Powell the benefit, and impose upon Norton the loss, of certain taxes against the land which were paid by Norton. In this connection it may be noted that it is undisputed that Mary E. Norton, within the time allowed by law, paid to the sheriff of Ramsey county the full amount due on the certificate of sale held by Powell. This amount is the full amount of the certificate and interest at the rate of 12 per cent per annum from the date of sale to the date of the redemption. No question has been raised as to the regularity of this redemption,—provided Mary E. Norton did in fact have any such interest in the premises as entitled her to redeem.

As stated in the opinion prepared by Mr. Justice Grace, the controversy before us is the one between Powell and the Nortons, and this alone. The rights of Largent are not before us. It appears from the record and the evidence that Largent was induced to intervene at the instance of Powell, but he afterwards signed a dismissal of his complaint in intervention. There is some controversy in regard to whether the stipulation of dismissal should be enforced or set aside. I shall not enter into a discussion of this feature of the case, as it would serve no useful purpose to do so. The fact remains that under the judgment rendered by the trial court Powell will become the owner under the foreclosure, and the sheriff's deed which he will receive will cut off all rights of Largent in the land. Largent has not appealed. The appeal has been taken by the defendants only. An affirmance of the judgment will benefit Powell alone. Largent can in no manner be benefited by an affirmance, or, be injured by a reversal, of the judgment, and a dismissal of plaintiff's action. The question before us is not as to the rights of Largent, but as to the respective rights of Powell on the one hand and the defendants on the other. The ultimate question is: Has the plaintiff, Powell, established his cause of action against the defendants? If so, he should prevail, if not, his action should be dismissed. It necessarily follows from the views I have expressed above that I am of the opinion that plaintiff has failed to establish his cause of action, and believe that this action should be dismissed.

BRUCE, Ch. J. I concur in the opinions of both Mr. Justice GRACE and Mr. Justice CHRISTIANSON.

ROBINSON, J. (dissenting). Few and simple are the facts of this case. John Largent owned the land in question and for a small sum he foolishly mortgaged the same to Powell. The mortgage was foreclosed by advertisement and at the sheriff's sale Powell bid in the land and a certificate of sale was made to him. That was on May 4, 1903.

On April 28, 1904, P. D. Norton was the attorney and collector of the Harvester Company. It held for collection a judgment against John Largent for \$130, and as attorney for the company Norton hired a livery and went out into the country and called on Largent and induced him to make a deed of the land to satisfy the judgment. He either took the deed in his own name or afterwards inserted his name as grantee, and at once conveyed the land to his wife and then in her name attempted to redeem from the foreclosure by paying to the sheriff the sum for which the land had been sold with interest. In the meantime, to-wit: on April 30, 1904, Powell made with the Harvester Company a written contract whereby in consideration of \$150, it agreed to transfer to Geo. W. Mooers, the judgment and its title to the land.

Pursuant to the contract Powell paid \$20 cash and paid the balance of \$130 to the Ramsey County National Bank and received a proper assignment of the judgment in the name of Geo. W. Mooers. Norton took receipts for his expenses in the name of the Harvester Company and it paid the same but declined to transfer the title to the land or to induce Norton to transfer it.

This suit was brought to enforce the specific performance of the contract with the Harvester Company or to charge it and Norton as trustees for the benefit of Powell. The trial court gave judgment in favor of the plaintiff and the Nortons appeal.

The facts do show conclusively that the deed was made for no purpose only to satisfy the judgment which Norton was employed to collect. He paid no consideration for the land and he took the deed only as trustee for the Harvester Company or the judgment creditors and their assigns. And, of course, the title he obtained inured to their benefit and his subsequent dealings with Largent are matters of no consequence whatever.

Powell refused to accept the money which Norton paid the sheriff



in attempting to redeem and it has always remained the money of Norton. These are the facts from which there can be only one conclusion.

The judgment of the district court should be affirmed with this addition that the defendants and each of them be forever barred from asserting any title or interest in the land described in the complaint to-wit: Lots 1 and 2 and the south half of the northeast quarter of section 1 in town 157 of range 63.

### On Petition for Rehearing.

**PER CURIAM.** Plaintiffs have petitioned for a rehearing. The principal point urged in the petition is that this court was and is without jurisdiction to consider any question on this appeal for the reason that Largent has not been served with notice of appeal. It is doubtless true, as asserted by the plaintiffs, that a party who desires to appeal from a judgment or order must serve notice of appeal upon all "adverse" parties. For, of course, a court cannot determine the rights of a party not before it; and, hence, an appellate court has no jurisdiction to reverse or modify the judgment in such manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and finally determined by the judgment. But the lack of jurisdiction does not exist where such reversal or modification cannot affect the legal rights of the parties not served with notice. *Williams v. Santa Clara Min. Asso.* 66 Cal. 193, 194, 5 Pac. 86. It by no means follows that every person named in the title of an action as a party plaintiff is an adverse party on an appeal taken by the defendant from a judgment rendered in such action; or that every person named as a party defendant is an adverse party on an appeal taken by the plaintiff. An "adverse" party, within the meaning of the statute relating to service of notice of appeal is one whose interest in the judgment or order appealed from is in conflict with the modification or reversal sought by the appellant. *Spelling New Tr. & App. Pr.* p. 1140; *Conrad v. Pacific Pkg. Co.* 34 Or. 341, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021. And "mere nominal parties or parties who have no interest that can be affected by the judgment on appeal" need not be served

with notice of appeal. *Smith v. Burns*, 71 Or. 133, L.R.A.1915A, 1130, 135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666; 2 R. C. L. pp. 68-69; 3 C. J. 1017. As was said by the Supreme Court of the United States (*Amadoo v. Northern Assur. Co.* 201 U. S. 194, 201, 50 L. ed. 722, 726, 26 Sup. Ct. Rep. 507): "Parties having no *legal* interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal."

Plaintiffs brought the instant action to compel the International Harvester Company of America to perform a certain contract; and in order to facilitate and make such performance possible, they asked that the deed from Largent to Norton be reformed by substituting the International Harvester Company of America as grantee in such deed in place of Norton.

As stated in the former opinions Powell had a mortgage, which had been foreclosed. The time for redemption had expired, unless the redemption made by Mary E. Norton was effective. In its findings of fact, the trial court ignored the theory of the case, and the issues framed by the pleadings, and made findings with respect to the mortgage from Largent to Powell, the foreclosure of such mortgage, and ordered judgment in favor of Powell for a cancellation of the Norton deeds, and further ordered judgment "*that the plaintiff, Albert M. Powell, is entitled to a sheriff's deed based upon the foreclosure of the mortgage, etc.*" The effect of this judgment was to award the premises to Powell, and to divest Largent as well as the Nortons of every interest in or claim upon the premises. The appellants in this case are not asking for the reversal or modification of a judgment favorable to Largent. They are asking for the reversal of a judgment favorable to Powell alone. And there is absolutely no way, reasonably anticipatory, whereby any legal or substantial right of Largent can in any way be affected by a reversal of the judgment, and a dismissal of plaintiff's action. Not only is this, in our opinion, the only conclusion which can be drawn from the facts referred to, but Largent's testimony as contained in the record fails to disclose any condition under which he could be benefited by an affirmance, or deprived of any benefit by a reversal, of the judgment. Not only so, but Largent's testimony contains strong intimations that he had and has no personal interest in the litigation. He testified that he intervened at

Powell's request, and would not have done so in the absence of such request. He also testified that after he had signed the stipulation for a dismissal of the petition in intervention, it was at Powell's request that he asked to be relieved from the stipulation and once more become a party.

In the petition for rehearing it is contended, in effect, that the court should not examine the record, but that "the motion to dismiss must be determined from the pleadings or, at the most, from the findings or judgment in addition to the pleadings." It is doubtless true that ordinarily an appellate court will refuse to consider the merits, or examine the entire record, on a motion to dismiss the appeal. This does not mean, however, that the court will dismiss an appeal because it necessitates an examination of the record to determine whether the motion should be granted or denied. Corpus juris says: "Where, in passing on a motion to dismiss, the court would be required to examine the entire record, the motion will not be considered in advance of a hearing on the merits. The practice in such case is to deny the motion with leave to renew it on submission of the cause on the merits. The court may examine the whole record in determining jurisdiction on a motion to dismiss." 4 C. J. 603.

We adhere to our former opinions. Plaintiffs' action is ordered dismissed. A rehearing is denied.

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J. M. COLLARD, Respondent, v. ANTON FRIED, Appellant.

(170 N. W. 525.)

**Share cropper contract — action under — by cropper — for conversion — seasonably instituted — plaintiff entitled to highest market value of grain — between dates of conversion and verdict.**

1. In an action brought by a share cropper for the conversion of his share of grain raised upon land belonging to the defendant, the action having been seasonably brought and diligently prosecuted, it is held that the plaintiff is entitled to the highest market value of the property between the date of the conversion and the verdict.

**Conveyance — fraudulent as to creditors of vendor — action to set aside — employment of counsel by defendant therein — in defense of his title — expenses of suit — cannot counterclaim same in subsequent suit.**

2. Where a defendant had found it necessary to employ counsel to defend a conveyance made by the plaintiff to the defendant against the charge that such conveyance was fraudulent as to creditors of the plaintiff, he is not entitled, in a subsequent suit, to establish as a counterclaim the amount paid in defense of the suit.

**Previous litigation — in which plaintiff and defendant were parties defendant — account between them — litigated and determined — becomes *res judicata* — cannot subsequently be counterclaimed.**

3. Where, in previous litigation to which plaintiff and defendant were parties defendant, an account existing between them was litigated and formed the basis for determining the amount owing by one to the other, the account is *res judicata* and cannot subsequently be made the basis of a counterclaim.

**Jury — instructions of court — where law of case is covered — not error to refuse requested instructions.**

4. Where instructions given to the jury fairly cover the law applicable to the case, it is not error to refuse to give instructions requested.

**Assignments of error.**

5. Other assignments of error examined and held to be without merit.

On Petition for Rehearing.

**Affirmance of judgment — conditions.**

6. It appearing that evidence in support of a counterclaim was improperly excluded, the affirmance of the judgment is conditioned upon a confession of judgment by the plaintiff for the amount involved in the counterclaim and in favor of the defendant. Otherwise, a new trial is ordered.

Opinion filed November 18, 1918. Rehearing denied January 9, 1919.

**Appeal from the District Court of Barnes County, J. A. Coffey, J. Affirmed.**

*Knauf & Knauf*, for appellant.

Where a party is asked the question, "Did you comply with your contract," a mere legal conclusion is involved and asked, and is objectionable on such ground and as incompetent, and the objection should have been sustained. *Bristol & Sweet v. Skapple & Montgomery*, 17 N. D. 271; *American Soda Fountain Co. v. Hogue*, 17 N. D. 375; *Norris v. Equitable Fire Asso.* 19 S. D. 114, 102 N. W. 306; *Wyckoff*

v. Kerr, 123 N. W. 735; *Graham v. Pennsylvania Co.* 12 L.R.A. 293 and note.

A grantor is required to protect and defend the title he conveys to his grantee under a warranty deed containing the usual covenants, and in an action to set aside such conveyances as fraudulent as to grantor's creditors, where the grantor defaults and the grantee alone is compelled to defend, in a subsequent action between him and his grantor, he may counterclaim his reasonable and necessary expenses in such former suit. Comp. Laws 1913, § 5959; *Brooks v. Mohl*, 104 Minn. 404, 17 L.R.A.(N.S.) 1195, 116 N. W. 931, and cases cited; *Bowne v. Walcott*, 1 N. D. 415.

It is the duty of the trial court to charge the jury on all material law points involved in the case, and his failure to do so is error. Comp. Laws 1913, § 7620; *Moline Plow Co. v. Gilbert*, 3 Dak. 229, 15 N. W. 1.

Parties make their own contracts, and so long as they are lawful it is merely the duty of the court to construe them. *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Bidwood v. Monarch Elev. Co.* 9 N. D. 627, 84 N. W. 561; *Hawk v. Konouski*, 10 N. D. 37, 64 N. W. 563; *Van Gorder v. Goldmer*, 16 N. D. 323, 113 N. W. 609; *Aronson v. Oppgaard*, 16 N. D. 595, 114 N. W. 377; *Wadsworth v. Owens*, 17 N. D. 173, 115 N. W. 667; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304; *Consolidated L. & I. Co. v. Hall*, 7 S. D. 229, 63 N. W. 904; *Wentworth v. Miller*, 53 Cal. 550; *Edson v. Colbourne*, 28 Vt. 631, 67 Am. Dec. 730.

*F. B. Lambert*, for respondent.

"Opinions of witnesses derived from observations are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained." *Jones*, Ev. 2d ed. § 366.

The decision of the trial court as to the competency of the expert witness is a preliminary question, resting in the discretion of the court, and unless founded on some error of law, or serious mistake, or clear abuse, it will not be disturbed. *Jones*, Evidence, 2d ed. §§ 369, 382.

"Where a witness gave the result of what he saw, his testimony is not objectionable on the ground that it is a conclusion instead of a statement of facts." *Seckerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239; *State v. Stuble*, 41 Iowa, 232.

"The statement of a witness of a conclusion is not prejudicial if

immediately followed by a statement of the grounds therefor." *Miller v. DeFrance*, 90 Iowa, 395, 57 N. W. 959; *Kincaid v. Cavanaugh*, 198 Mass. 34, 84 N. W. 307; 40 Cyc. 2408; *Blackorby v. Ginter*, 34 N. D. 254.

Where error is claimed, if it was without possible prejudice or injury to the complaining party, it was harmless and will not afford ground for reversal. *Bradley v. Spikardsville*, 90 Mo. App. 416.

"The error, if any, in permitting a witness to state conclusions, is not prejudicial, where the conclusions were accompanied by a statement of the facts from which they were drawn." *Dollar v. Bank* (Cal. App.) 109 Pac. 499; *Churchill v. Mace*, 148 Mich. 456, 111 N. W. 1034; *Columbia Box & Lbr. Co. v. Drown*, 84 C. C. A. 269, 156 Fed. 459; *Turner v. Turner*, 26 Ind. App. 677, 60 N. E. 718.

In such cases as the one here there is no conversion until after plaintiff had performed his part of the contract and had made a demand for the grain belonging to him under the contract. Upon refusal the action should be commenced seasonably in order to entitle plaintiff to recover the highest market value of the grain between the dates of conversion and the verdict.

The steps were all taken by plaintiff, and he is entitled to the highest market value. *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 335, 162 N. W. 543.

**BIRDZELL, J.** This action is a sequel to two former suits, one of which is reported in *Merchants' Nat. Bank v. Collard*, 33 N. D. 556, 157 N. W. 488. The former suits were actions in the nature of creditors' bills to set aside certain conveyances of real property by Collard and his wife to Fried. The parties to this suit were parties defendant in those actions, and it was there held that the conveyances made by the plaintiff and respondent to the defendant and appellant in this action were not fraudulent. This action was brought to recover the value of the grain raised upon the lands involved in the former suits during the year 1915, which grain, it is alleged, was raised by the plaintiff, who occupied the premises under a cropper's contract. It is alleged that the grain was delivered to the defendant and subsequently converted by him. The defendant answered, setting up certain portions of the lease which he claimed were broken by the plaintiff,

resulting in damage to the defendant, and also alleged that there were certain balances due to him from the plaintiff for goods, wares, and merchandise, and for expenses incurred by the defendant in the defense of the previous actions by the plaintiff's creditors in which it was sought to set aside conveyances made to the defendant. The defendant's items of counterclaim amount to the sum of \$5,131.55 as against which he credits the plaintiff with the sum of \$1,395, the alleged value of the plaintiff's share of the crops which had been received and sold by the defendant. Many of the items of counterclaim were alleged to have arisen prior to April, 1915, and the plaintiff replied to the counterclaim, alleging that all differences and indebtedness between the plaintiff and defendant had been settled in the previous litigation (in which they were both parties defendant), and were included in the judgment entered in April, 1915. The issues were tried to a jury and a verdict rendered in favor of the plaintiff for the sum of \$3,662.76, upon which judgment was entered. This appeal is from the order of the trial court denying a motion for a new trial and from the judgment.

Counsel for the appellant present 39 assignments of error. The first assignment relates to the introduction in evidence of the rental contract between the parties. Defendant's counsel objected to its introduction on the ground that there were upon the back of the exhibit some figures which were foreign to the contract. The exhibit was offered by the plaintiff's attorney with the statement that he did not offer in evidence the figures on the back and that they were to be excluded. There is no merit in this assignment.

It is next urged that the court erred in overruling defendant's objection to a question asked of the plaintiff as follows: "Did you comply with your contract?" The objection was that the question called for a legal conclusion. Compliance with the contract is in itself a conclusion of fact, and, inasmuch as the defendant had ample opportunity to cross-examine the plaintiff as to the character and degree of performance, there is no merit in this assignment.

Assignments 3, 4, and 8 relate to the propriety of permitting the plaintiff and one Holden to testify concerning the price of wheat at Wimbledon on the 25th and 26th of August, 1915, and on subsequent dates up to about May 1st following. The record discloses that there

was ample testimony upon the question of the quantity and grades of grain alleged to have been converted by the defendant, and that the plaintiff testified to his knowledge of the market prices with references to the grades, fixing the dates for the given prices as best he could from memory. It appears that the action was promptly brought after the alleged conversion took place, and that the plaintiff and respondent has brought himself within § 7168 of the Compiled Laws of 1913, which provides for the recovery of the highest market value of the property converted as damages when the action is prosecuted with reasonable diligence.

It is next contended that the court erred in allowing the plaintiff to testify that he had prosecuted his action diligently. We cannot see wherein this testimony is seriously prejudicial to the defendant. This assignment is obviously without merit.

Assignments 10, 11, and 12 relate to rulings of the court excluding the witness's legal conclusion as to whether or not in the previous litigation hereinbefore referred to, to which plaintiff and defendant were parties, title to lands conveyed by the plaintiff to the defendant was in question. The record discloses that the pleadings, findings, conclusions, order for judgment, and judgment in the former suits were admitted, having been offered by defendant's counsel. In the face of this record, it is absurd to contend that it was error to refuse to allow the witness to testify to his conclusion as to what was involved in these former suits.

At this point we may as well consider the validity of the defendant's counterclaim for \$500 attorneys' fees, paid in defending the former actions. Apparently the sole object in introducing the records of the former suits was to lay a foundation for this claim. Upon the appeal in the case of Merchants' National Bank v. Collard, *supra*, this court adopted the findings of the trial court. It appeared that the defendant, Fried, was himself interested in protecting the title acquired from Collard from the assault of the plaintiff. It was claimed that the conveyances were fraudulent, and that Fried was a party to the fraud. Furthermore, it appeared in the litigation that the interests of Collard and Fried did not run altogether parallel, since it was found, contrary to the allegations in Fried's answer, that he still owed Collard a part of the purchase price, which part was held to be subject to the lien of the plaintiff's judgment. Under these circumstances, the defendant,



Fried, in this action can have no valid counterclaim based upon the costs of defending the former suit or suits. It is not even contended here that Collard's title is subject to any defect or that the title vested in Fried has been in danger of being divested on account of any action or circumstance in which he was not a participant. The trial court, however, instructed the jury that if they should find that it had been necessary for the defendant to expend \$500 for attorneys' fees to defend the title conveyed to him by the plaintiff, they might allow it as a counterclaim in this action, but if they should find otherwise, defendant would not be entitled to recover the same. This instruction was as favorable as the defendant could ask.

Assignments 18 and 22 attack the propriety of excluding from this case a counterclaim based upon an account of indebtedness owing by the plaintiff to the defendant in the year 1914. This account was first admitted, but later excluded on the ground that, as stated by the trial court, "it is a question which has been held in abeyance for some time, or a ruling rather; and (I) desire to make a ruling that *the account for 1914 has already been adjudicated in the former cases, as well as the crops of 1914, and these matters are not in this case at this time.*" The record shows that the trial judge made this ruling after he had "taken the time to look over the pleadings, evidence, and record" [in the former actions]. The former suits were equitable in their nature and were tried to the court, and the same judge who sat in the trial of this action determined the facts in those cases. His statement in the record in this case, quoted above, as well as his statement found in the reasons assigned for denying the motion for a new trial, are entitled to great weight upon the question of *res judicata*. In the memorandum opinion, denying the motion for a new trial, the judge said: "A claim of several hundred dollars was contended for, going back to the 1914 account, which was adjudicated in the former action and shown in the former record." A 1914 book account appears in this case as defendant's exhibit 13. The same account appeared as an exhibit in the former case of *Merchant's Nat. Bank v. Collard*, 33 N. D. 556, 157 N. W. 488, and inasmuch as it was necessary to determine in that case the amount of Collard's equity, if any, in the land, there can be no question but what his indebtedness to Fried was taken into considera-

tion in arriving at the value of his equity. It was clearly not error to exclude the 1914 account and to instruct the jury to disregard it.

A number of assignments of error are based upon the instructions given to the jury. We have carefully read the instructions and they appear to us to correctly state the issues raised by the pleadings and the law applicable thereto. Assignments 31, 32, 33, 34, 35, and 36 are predicated upon the refusal of the court to give certain requested instructions. An examination of the requested instructions and a comparison of the same with the charge given disclose that, in so far as the requested instructions state the law applicable to the case, such law was amply covered in the instructions given. In these circumstances it was not error to refuse to give the instructions requested.

The record discloses that the issues in this case have been fairly and fully tried before a jury, that the jury was properly instructed upon the law, and that a verdict was rendered which is well within the evidence. The motion for a new trial presents no matter for consideration that is not covered by the other assignments.

Finding no error in the record prejudicial to the defendant, the judgment is affirmed.

#### On Petition for Rehearing.

BIRDZELL, J. In a petition for rehearing counsel for the appellant again urges that, in the previous litigation referred to in the original opinion, the items which went to make up the purchase price of the lands sold by Collard to Fried did not include Collard's account at the Fried store in 1914. In our original opinion we were inclined to attach great weight to the statement of the trial judge in the record in this case to the effect that the 1914 account had been adjudicated in the former cases referred to. A more careful and painstaking examination of the record in the previous litigation, however, convinces us that the trial judge was mistaken in so holding.

Paragraph 6 of the findings of fact in *Merchants' Nat. Bank v. Collard*, 33 N. D. 556, 157 N. W. 488, finds that on the 22d day of June, 1911, and on the 2d day of August, 1913, Collard transferred certain lands to Anton Fried and Susan Fried, respectively, the consideration for the transfers being fully set forth. The consideration found for

the two transfers was \$30 per acre or \$19,200, the purchasers assuming encumbrances as a part of the purchase price. It was further found that the Frieds were to charge Collard with the balance of any and all accounts which they had against Collard, and, as soon as the sums so assumed could be ascertained, they, the Frieds, would pay to Collard the balance found to be due on the purchase. The court then found (without itemizing) that the Frieds had paid encumbrances against the land and assumed others, "making the total amount assumed, paid, and charged, as and for the purchase price and properly applied thereon, the sum of \$17,418.24." It then found that there still remained due to Collard \$1,881.76, and it placed the amount of Collard's equity in the land at this sum, with interest at the rate of 7 per cent from the date of sale, and further found "that the payment of said amount by the said defendants Fried is the only condition attached to said transaction to prevent them from being the fee holders and owners thereof." The question now is, Did the 1914 book account constitute a part of the sum of \$17,418.24, credited to Collard upon the purchase price in the above finding?

A careful examination of the transcript of the testimony upon which the above findings were based discloses that the book account for the year 1914 did not enter into the consideration for either of the transfers. On the contrary, it shows that the debit items, amounting to \$475.44, were partially offset in the statement by credit allowances for Collard's share of crops delivered to Fried and sold by him, and that neither the crops nor the accounts subsequent to the execution of the second deed entered into the consideration or the findings. In view of this fact, it was clearly error for the trial court in this action to exclude the testimony in support of the counterclaim based upon the book account of 1914. This error cannot be corrected without a retrial of this action, unless the judgment creditor will voluntarily allow credit upon the judgment for the sum of \$390.53, with interest at the rate of 6 per cent from January 1st, 1915, to date. The order of this court is that, upon the filing of a confession of judgment in the district court on the defendant's counterclaim in the above amount, the judgment appealed from be, and hereby is, affirmed; and that neither party recover costs on this appeal; otherwise the judgment is reversed and a new trial granted, with costs to abide the event.

The petition for rehearing is denied.

STATE OF NORTH DAKOTA EX REL. N. B. LIVINGSTON,  
Respondent, v. F. W. ROSE, C. L. Tompkins, Tom Smith, G. J.  
Peterson, W. N. Hocking, Members of the North Dakota Board  
of Dental Examiners, Appellants.

(170 N. W. 879.)

**Record on appeal — evidence not contained in — facts found by trial court —  
presumed established by evidence.**

Where the evidence is not contained in the record transmitted to this court,  
it must be assumed that the evidence adduced upon the trial established the  
facts as found by the trial court.

Opinion filed January 9, 1919.

From a judgment of the District Court of Ward County, *Leighton,*  
J., defendants appeal.

Affirmed.

*William Langer*, Attorney General, *Daniel Brennan*, Assistant At-  
torney General, and *O. B. Herigstad*, State's Attorney, Ward county,  
for appellants.

The appellants claim that the respondent has not complied with the  
laws of this state, nor does his complaint or petition herein contain a  
statement of facts showing his compliance with the laws of this state,  
or that he is a properly qualified person to admit to the practice of den-  
tistry in this state. There is no showing that respondent ever presented  
to these appellants, the dental board, any evidence of his preliminary  
high school education which entitles him to admission without condi-  
tion to the freshman class in the College of Liberal Arts of the Uni-  
versity of North Dakota, and he is not entitled to take the examination  
under the laws of this state. Sess. Laws 1915, chap. 119, § 2; Comp.  
Laws 1913, § 510; Sess. Laws 1911, chap. 280.

*Sinkler & Eide* and *Fisk & Murphy*, for respondent.

The petition here was not subject to attack by demurrer, the proper  
practice being a motion to quash the alternative writ. *State v. Olson*,  
30 S. D. 460, 139 N. W. 109.

This being a special proceeding of a civil nature, the findings upon

disputed questions of fact have the force of a verdict, and will not be disturbed if there is any evidence to support them. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871; *State ex rel. Trimble v. St. Paul & S. Ste. M. R. Co.* 28 N. D. 621, 150 N. W. 463.

The statute here under consideration is reciprocal in its nature, and should be given a liberal construction. Laws 1915, § 2, chap. 119.

**PER CURIAM.** This is an appeal from an order granting a writ of mandamus directing defendants as members of the North Dakota Board of Dental Examiners to issue to the petitioner N. B. Livingston, a license to practise dentistry in the state of North Dakota. The return of answer alleges that the laws of Arkansas, where the petitioner formerly practised his profession, did not maintain a standard equal to that required in this state, and that therefore the petitioner was not entitled to be admitted to practise under the provisions of § 2, of chapter 19, of the Laws of 1915. The case comes to this court upon the judgment roll alone. No statement of the case has been settled. Hence, it must be assumed that the facts as found by the trial court were established by the evidence. The trial court found that the standard established by the laws of Arkansas was equal to that established by this state. Ordinarily the laws of a sister state must be pleaded and proved as facts. 5 Enc. Ev. 808. But in this state the judge, upon being called upon to do so, may take judicial notice "of the laws of a sister state when the printed and authenticated volumes are presented to the court for examination." Comp. Laws 1913, § 7938, subd. 63. In the case at bar the findings of fact of the trial court sustained the conclusions drawn. And in the absence of the evidence, we are in no position to review the correctness of the findings or determine whether they are in fact sustained by the evidence. The judgment of the District Court must therefore be affirmed. It is so ordered.

GRACE, J. I concur in the result.

**ROY REICHERT, Respondent, v. C. W. REICHERT, Appellant.**

(170 N. W. 621.)

**County court — final decree — vacating or opening — cannot after one year.**

1. After the expiration of one year from the date of entry of a final decree, the county court has no authority to vacate or open up the same upon grounds of fraud, deception, or misrepresentation.

**County court — vacating or opening final decree — powers of — limitation as to time.**

2. Sections 8534, 8595, and 8596, Compiled Laws 1913, construed and held to prescribe the power of a county court to open up and vacate a final decree, the grounds therefor, and the limitations of time thereupon.

**Final decree — guardianship estate — petition to vacate — district court — appeal to.**

3. Where a final decree was entered in a guardianship estate on August 11, 1911, and a petition to vacate the same was filed in the county court on March 31, 1916, and thereafter an appeal was taken to the district court from an order of the county court, vacating such decree and a trial *de novo* had, the trial court erred in affirming the order of such county court.

**Appeal from the District Court of Foster County.****Action to vacate final decree of county court.**

From an order of the district court affirming the order of the county court the defendant appeals.

Reversed, with direction to reverse the order of the county court and to dismiss the proceeding therein to vacate such final decree.

*Edward P. Kelly*, for appellant.

An order or decree of distribution made by a county court is of equal rank with judgments entered by courts of record. Comp. Laws 1913, § 8837; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008.

A decree allowing final account is conclusive except where right of appeal is allowed or relief in other court permitted, or where persons against whom decree is made are under legal disability. *Re Nelson*, 26 S. D. 615, 125 N. W. 113.

That a former judgment or decree can be set aside and annulled for fraud, there can be no question, but it must be a fraud extrinsic and collateral to the questions examined and determined in the action, and

it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason for the rule is that there must be an end of the litigation. *Graves v. Graves* (Iowa) 109 N. W. 707; *Pico v. Cohn*, 91 Cal. 129, 27 Pac. 970; *Mahoney v. State Ins. Co.* 110 N. W. 1041; *Hedrick v. Smith & Read*, 115 N. W. 226; *Richards v. Moran* (Iowa) 114 N. W. 1035; *Clark v. Lee* (Minn.) 59 N. W. 970; *Keighler v. Savage Mfg. Co.* 71 Am. Dec. 600; *Reeves v. Reeves* (S. D.) 25 L.R.A.(N.S.) 574; *South Haven & Eastern R. Co. v. Colner*, 23 L.R.A.(N.S.) 564; *Zeitland v. Zeitland* (Mass.) 23 L.R.A.(N.S.) 569; *Bleakley v. Barclay* (Kan.) 10 L.R.A.(N.S.) 230; *Moore v. Gulley* (N. C.) 10 L.R.A.(N.S.) 242; *Yorke v. Yorke*, 3 N. D. 343; *Casey v. Powell*, 73 Am. Dec. 211.

That a judgment was confessedly procured by perjury gives a court of equity no jurisdiction to enjoin its enforcement. *Reeves v. Reeves* (S. D.) 25 L.R.A.(N.S.) 574; *South Haven & E. R. Co. v. Colner*, 23 L.R.A.(N.S.) 564; *Zeitland v. Zeitland* (Mass.) 23 L.R.A.(N.S.) 569; *Bleakley v. Barclay* (Kan.) 10 L.R.A.(N.S.) 230; *Moore v. Gulley* (N. C.) 10 L.R.A.(N.S.) 242; *Yorke v. Yorke*, 3 N. D. 343; *Casey v. Powell*, 73 Am. Dec. 211.

*T. F. McCue*, for respondent.

Courts possess the inherent power to vacate and set aside collusive and fraudulent judgments, notwithstanding that more than one year has elapsed after their entry. *Williams v. School Dist.* 21 N. D. 198; *Yorke v. Yorke*, 3 N. D. 343; *Freeman v. Wood*, 11 N. D. 7.

A guardian who conceals from the court the fact that he has bought land with his ward's money commits a fraud and deception on the court, for which relief will be granted. *Gilbreath v. Teufel*, 15 N. D. 152; *Bergin v. Haight*, 33 Pac. 760; *Campbell v. Campbell*, 92 Pac. 184; Code § 5852; 29 Am. & Eng. Enc. Law, 2d ed. 123, 125, 127; *Leach v. Leach* (Wis.) 26 N. W. 754; *Ross v. Conway*, 28 Pac. 786.

Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised upon him by his opponent, as by keeping him away from court, a false promise of compromise, or anything that prevents a real trial or contest, there exist reasons for which a suit may be sustained to annul and set aside the former judgments or decree and open the case for a new trial and a fair

hearing. Flood v. Templeton, 92 Pac. 81; Bacon v. Bacon, 89 Pac. 317; Sohler v. Sohler (Cal.) 67 Pac. 282.

Courts do not now invoke technical rules to shield the cunning in taking advantage of the weak, ignorant, or dependent. Gilbreath v. Teufel, 15 N. D. 152; Sohler v. Sohler (Cal.) 67 Pac. 282; Parker v. O'Reardon, 65 Cal. 368; Balin v. Dean (Iowa) 142 N. W. 422; Laun v. Kipp (Wis.) 145 N. W. 183.

BRONSON, J. This proceeding was brought in county court of Foster county to vacate a final decree rendered in a guardianship estate.

On August 11, 1911, a final decree was entered in the matter of the guardianship of Roy Reichert, the respondent herein, and others, minors, the appellant, C. W. Reichert, being the guardian. On March 31, 1916, a petition was filed in said court in behalf of respondent to vacate such final decree upon grounds of fraud, deception, and misrepresentation.

On April 21, 1916, pursuant to a hearing held, the county court vacated such decree, from which order, the guardian, the appellant herein, appealed to the district court, where the matter was tried *de novo*. The district court, after trial, made findings and judgment affirming the order of the county court.

From such judgment the appellant prosecutes this appeal and specifies as error the conclusions of law and the judgment so entered.

The question of law appearing in this record that determines the appeal is as follows:

What power of authority has a county court to vacate or open up its final decree upon a motion covering the grounds above stated, after the expiration of one year from date thereof?

Under § 8534, subdivision 7, Compiled Laws 1913, the county court has authority and power to open up, vacate, or modify a decree or order of the court for fraud, mistake, newly discovered evidence, or other sufficient cause.

Under § 8595 Compiled Laws 1913, a rehearing involving a motion to vacate and open up a decree or order may be made upon grounds of fraud, misconduct, newly discovered evidence, abuse of discretion of court, etc.

Under § 8596, Compiled Laws 1913, such motion must be made, in



any event, within one year from date of the decree, except upon the nonexistence of any fact necessary to jurisdiction. There is no claim in this action that the county court did not have jurisdiction in the guardianship proceedings.

It is clear that if the respondent had made the motion involved herein, within one year from the date of the decree, the county court could have entertained the same under the provisions of said §§ 8595 and 8596.

Respondent, however, contends that, under the constitutional provisions, § 111, granting exclusive jurisdiction in probate and testamentary matters, and under said § 8534, subdivision 7, the county court has inherent power to vacate such decree; that this is a common-law power possessed by the court as a part of its necessary machinery for the administration of justice; that this proceeding is not an equitable proceeding nor one seeking equitable relief.

This contention is answered by the manner in which the express provisions of the statute have limited these so-termed common-law powers.

Section 8534, subdivision 7, prescribes specifically the authority and power; §§ 8595 and 8596 provide the causes, the manner, and the time within which they may be exercised.

In *Fischer v. Dolwig*, 29 N. D. 561, 151 N. W. 431, this court expressly held that these provisions of the statute should be considered together, and not as independent unrelated statutory provisions.

Respondent contends that § 8809, Compiled Laws 1913, providing a limitation of time within which actions for the recovery of an estate or to set aside a decree must be commenced, being found in the Probate Code, grants a jurisdiction to the county court in matters similar to the motion herein involved.

This statute confers no jurisdiction in the county court in that regard, and is a statute of limitation applicable to actions in a court of general jurisdiction; the county court possesses no equitable jurisdiction except such as inheres in its common-law, constitutional, and statutory powers. *Arnegard v. Arnegard*, 7 N. D. 475, 502, 41 L.R.A. 258, 75 N. W. 797; *Finn v. Walsh*, 19 N. D. 61, 121 N. W. 431; *Mead v. First Nat. Bank*, 24 N. D. 12, 138 N. W. 365; *Fischer v. Dolwig*, 39 N. D. 161, 166 N. W. 797.

A final decree of a county court is of equal rank with a judgment

entered in other courts in this state, and is entitled to the same faith and credit. Comp. Laws 1913, § 8533; *Fischer v. Dolwig*, 29 N. D. 561, 151 N. W. 431; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008; *Stenson v. H. S. Halvorson Co.* 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289.

If attacked or attempted to be set aside in a county court, the jurisdiction so to do must be invoked from these common law, constitutional, or statutory provisions granted. Its authority must be measured by such provisions.

Even the district court would have no power to vacate such decree, if the same had been a judgment rendered in such court, where the grounds for such vacation thereof fell within the statutory limitations imposed. Comp. Laws 1913, § 7483; *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937; *Skaar v. Eppeland*, 35 N. D. 116, 124, 159 N. W. 707; *Williams v. Fairmount School Dist.* 21 N. D. 198, 204, 129 N. W. 1027.

However desirable it might appear from the record that this decree involved should be vacated and a new hearing thereupon held, this court, under its sworn duty, cannot ignore and cast aside all statutory limitations that have been made by the legislature in an effort to prescribe a time of finality for causes and to expedite judicial litigation.

It is clear that the county court has no such jurisdiction under the plain provisions of our Constitution and the statutes, and therefore the order of such county court should have been reversed by the trial court upon the grounds of lack of jurisdiction to enter such order.

Under the broad jurisdictional and equitable powers conferred, subject to the statutory limitations, the district court affords to the respondent a remedy, if any cause of action he has. Comp. Laws 1913, §§ 7375, 8509, 8922, 8923; *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394, Ann. Cas. 1916A, 165; *Peterson v. Vanderburgh*, 77 Minn. 218, 77 Am. St. Rep. 671, 79 N. W. 828; *Geisberg v. O'Laughlin*, 38 Minn. 431, 93 N. W. 310; *Bruegger v. Cartier*, 20 N. D. 72, 80, 126 N. W. 491.

The judgment of the trial court is reversed, with directions to enter an order reversing the order of the county court and dismissing the proceedings therein to open up and vacate such final decree.

GRACE, J., being disqualified, did not participate, Honorable A. T. Cole, Judge of Third Judicial District, sitting in his stead.

ROBINSON, J. (dissenting). In this case the decision of the majority may accord with the old-line practice, and yet it is clearly wrong. The decision appealed from and reversed is confessedly right and just; yet it is reversed and the ward is thrown out of court, because, as the judges think, he came in by the wrong door.

As it appears, in March, 1913, the guardian and his ward appeared in the office of the county judge and had some talk concerning a final account which the guardian presented or purposed to present. There was no trial or hearing or evidence, and there is no showing that the ward ever saw the account or knew of its contents. The county court advised him to get an attorney, and he at once left and went to Canada. There was no adjournment of the case and no hearing, but five months afterwards the county judge signed an order allowing the paper then or previously filed, as an account. The county court had no jurisdiction. The parties were not legally before the court.

In April, 1916, the ward returned from Canada, learned of the order, and at once moved to vacate it. The motion was granted, and after a full and fair hearing of witnesses and a fair trial the order of the county court was affirmed by the district court. In the district court the complaint was amended, witnesses were sworn, examined, and cross-examined, and the case was tried the same as an action commenced in the district court. But now our judges reverse the district court, holding that the ward came into court at a wrong door, and that the void and fraudulent order of settlement should have been attacked by an action, and not by a motion. Such decisions do tend to make the law practice a travesty on justice.

On appeal the district court made findings of fact and conclusions of law. It found specially and generally that all the allegations of the complaint are true; that the final report of the guardian was grossly false and deceptive; that money of the ward had been invested in land and the report failed to give an account for the same, failed to account for any profits on any of the investments, and failed to allow interest for the use of the money, and charged the plaintiff with \$550 when he received only \$50; and that by undue influence the guardian

secured a receipt for \$550. The court found that the guardian advised the ward against employing counsel and promised to make a just and fair settlement; that the ward relied on the same, and did not employ counsel, and did nothing to protect his interest; and so it appears there was no hearing and no investigation and no accounting, and the account filed with the county court was false and untrue. The guardian charged himself with several sums of money received from 1904 to 1909, amounting to \$3,907.36. He charged the ward with money paid, \$550, when, according to his own testimony, he paid only \$50. And he filed a false receipt for the same, signed by the ward. His excuse is that \$500, included in the cash receipt, is for time that plaintiff failed to work before he came of age. Were he entitled to make such a charge, of course it should have been presented as a claim against the ward, and not as money paid to him.

As appears from defendant's testimony, with a part of the money he received as guardian, he bought land,—a Beatty quarter section,—and he never told Roy anything about it. (29.) He paid for the quarter section \$2,000, taking title in the name of McCue, and then took a deed from McCue for the express consideration of \$3,200, and he paid McCue for the transaction \$10. (32.) How was that for *hocus pocus*?

Counsel says that in the district court the verity of the final account was not in issue; but on the pleadings it was a very material issue. If the account was correct, then there was no good reason for vacating the order allowing it; if the account was grossly incorrect, then there was good reason for vacating the order. Now the account is impeached by the testimony of the guardian himself. He shows that it is grossly false and deceptive, as found by the county court and the district court. That alone was cause sufficient to vacate the final decree. The guardian acted in a fiduciary capacity. He was bound to keep and to render to the court a just and true account of his dealings with the estate of his ward. And the ward had a right to rely on his fairness and good faith, and to trust to his assurances that it was unnecessary for him to incur the expense of hiring a lawyer to protect his rights.

By the Probate Code it is provided the county court has power and authority in each case, to open, vacate, or modify a decree or order for fraud, mistake, newly discovered evidence, or other sufficient cause. Section 8534.

Counsel for defendant cites several sections of the statute in regard to rehearings, appeals, decrees of distribution, etc., but those statutes have not the least application to a case where, in the absence of a party and unknown to him, an adverse judgment or decree has been entered by fraud and imposition. Counsel does not seem to realize that this is a case where the guardian was bound to protect the ward and to take no advantage of him, and to render a just and true account, and that for the guardian to render an account grossly false and untrue was a fraud of the grossest kind. Indeed, it was a violation of his oath, faithfully and in accordance with law and to the best of his ability, to perform all the duties of his trust. Section 8684.

The judgment should be affirmed.

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**ELIZABETH MARY VANNETT, Appellant, v. E. H. COLE and  
Mary Cole, Respondents.**

(170 N. W. 663.)

**Auto driver — pedestrian about to cross street — in front of auto — duty of auto driver — must give warning of his approach — must endeavor to avoid injury to others.**

1. Under § 2972, Compiled Laws 1913, it is the duty of an auto driver who has observed a pedestrian about to cross a street crossing in front of his automobile, while operating the same upon the public streets of a city, to give warning of his approach by bell or by horn, if thereby injury can be avoided.

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**NOTE.**—Authorities passing on the question of liability of owner where automobile is being operated by member of owner's family are collated in notes in 41 L.R.A. (N.S.) 775; 50 L.R.A. (N.S.) 50; L.R.A.1916F, 223; L.R.A.1917F, 365; and L.R.A. 1918F, 297, where it is said that a husband was held not to be liable for injuries inflicted by his automobile while it was being operated by his wife solely for her own pleasure. There was no presumption that defendant's wife was in his service and engaged in his business, and the principle of *respondeat superior* did not apply.

On applicability of *res ipsa loquitur* to injury by automobile or other vehicle on highway, see note in 32 L.R.A. (N.S.) 1177.

**Respondeat superior—doctrine of—husband, and owner of auto—driven by wife with his full knowledge and consent—purposes of business—family pleasure—negligence.**

2. Under the doctrine of *respondeat superior* a husband is liable for the negligent operation of an automobile owned by him and driven by his wife, with his full acquiescence and consent for purposes of business or pleasure of the family.

**Personal injuries—damages for—action to recover—defendant's negligence—plaintiff's contributory negligence—questions for jury.**

3. In an action for personal injuries sustained by collision with an automobile, evidence *held* to require the submission of the question of defendant's negligence and plaintiff's contributory negligence to the jury.

**Plaintiff struck—knocked senseless by collision with auto—res ipsa loquitur—maxim of—does not apply.**

4. Where the plaintiff in an action for injuries is struck and knocked down senseless by collision with an automobile, *held* under the evidence, the maxim raised, *res ipsa loquitur*, does not apply.

Appeal from District Court of Cass County, *A. T. Cole, J.* Action to recover damage for personal injuries.

From a verdict directed and judgment entered for the defendant, plaintiff appeals.

Reversed and new trial granted.

*Smith Stimmel*, for appellant.

Negligence is sometimes defined to consist of failure to exercise that degree of care demanded by the circumstances,—a failure to observe a legal duty. 20 R. C. L. p. 9.

Where a statute or municipal ordinance imposes upon a person a duty designed for the protection of others, if he neglects to perform the duty he is liable to those for whose protection it was imposed for any damages resulting proximately from such neglect and of the character which the statute or ordinance was designed to prevent. *Osborne v. McMasters*, 41 N. W. 543.

"In judging of negligence all the circumstances are to be taken into account, and among other things the age and sex of the person injured so far as these are important." *Michigan C. R. Co. v. Hasseneyer*, 12 N. W. 155.

"A pedestrian in passing over a street crossing is not required to look both ways, and listen for approaching automobiles, but is bound

only to exercise such reasonable care as the case demands, for he has a right to assume that a driver of a motor car will also exercise due care in approaching the crossing with his car under proper control." *Baker v. Close*, 2 N. C. C. A. 289.

The failure of a pedestrian to look both ways for approaching automobiles before crossing a public street is not, as a matter of law, such negligence as will bar a recovery by him for injuries in consequence of being struck by an automobile. *Lynch v. Fisk Rubber Co.* 2 N. C. C. A. 298.

To establish negligence, direct and positive evidence is not necessary. Circumstantial evidence alone may authorize a finding of negligence. Plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on defendant's part, and of resulting injury to himself.

Having done this, he is entitled to recover, unless defendant rebuts this presumption by competent evidence. 20 R. C. L. 180; *Rosenfield v. Arrol*, 46 N. W. 768.

One producing a witness, and who is surprised by the testimony given, is not bound to accept such testimony as correct, but may establish the truth of material facts by other competent evidence, even though it tends to contradict the testimony of the other witness. *Snell v. Gregory*, 37 Mich. 500.

Contributory negligence must operate as a proximate cause of the injury or as one of the proximate causes, and not merely as a condition. *Smithwick v. Hall & U. Co.* 12 L.R.A. 279; *Lindvall v. Wood*, 44 Fed. 855.

Defendant could have easily stopped the car and prevented injury, and because of failure to do so he is liable for injuries sustained and damages resulting. *Carpenter v. Campbell Auto Co.* 4 N. C. C. A. 1, 21, 22; *Babbit, Motor Vehicles*, 964; *Tuttle v. Briscoe Mfg. Co.* 12 N. C. C. A. 909, 921.

Negligence cases in which a nonsuit may be allowed are exceptional. The issue or issues of negligence and contributory negligence are as a rule for the jury.

Such issues in this case were for the jury, and, because of the direction of a verdict by the court, error was committed which requires a reversal in this court. *State v. Lauer*, 20 L.R.A. 61; 20 R. C. L. pp.

136, 141, 166, 169, 199, ¶¶ 141, 164; Texas P. R. Co. v. Carlin, 60 L.R.A. 462; Hair v. Chicago, B. & G. R. Co. 121 N. W. 439; Brugge-man v. Illinois C. R. Co. 123 N. W. 1007; Pickett v. Wilmington & W. R. Co. 30 L.R.A. 257; Grand Trunk R. Co. v. Ives, 144 U. S. 408; Bogan v. Carolina C. R. Co. 55 L.R.A. 418; Huber v. LaCrosse City R. Co. 66 N. W. 798; Smithwick v. Hall & U. Co. 12 L.R.A. 279.

*Lawrence & Murphy*, for respondents.

\*It was the duty of plaintiff, when she saw the approaching automobile 25 feet away and had ample opportunity to avoid accident, to have observed where she was going, and in walking into the street in front of an approaching automobile, without using her eyes and making some attempt to avoid collision, she deliberately placed herself in a position of danger and was guilty of contributory negligence which prevents recovery. McCormick v. Hesser, 77 N. J. L. 173, 71 Atl. 55; Tolmie v. Woodward Taxicab Co. 178 Mich. 426, 144 N. W. 855.

The fact that defendant's car was driven in violation of the ordinance, and even though such violation was negligence as a matter of law, yet defendant is not precluded of the defense of contributory negligence. Davis v. John Bruener Co. 167 Cal. 683, 140 Pac. 586; 2 Bailey, p. 1462.

The rule requiring plaintiff to act at once when in the presence of great danger, and holding that he is not guilty of contributory negligence, as a matter of law, merely because he did not choose the best means of escape, only applies where the plaintiff is brought in the presence of immediate danger by and through the negligence and want of care of the defendant or others, and not where he is brought into such position by his own contributory negligence. 2 Bailey, p. 1462; Wilkins v. New York Transp. Co. 52 Misc. 167, 101 N. Y. Supp. 650; Seaman v. Mott, 127 App. Div. 18, 110 N. Y. Supp. 1040; 1 Shearm. & Redf. Neg. pp. 113-116.

Where there are two moving causes for injury,—one on part of plaintiff and one on part of defendant,—the burden is upon plaintiff to make it appear that it was more probable that the injury resulted from the cause for which defendant was responsible. Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183.

Where there is doubt as to how an injury occurred, it will be presumed accidental, rather than that it was the result of an illegal act.



*Stevens v. Cont. Cas. Co.* 12 N. D. 463, 97 N. W. 862; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305.

The court has no right to allow a jury to speculate or to act upon mere surmise or conjecture. 5 N. & C. C. C. 516-518; 164 N. W. 1030; 1 *Shearm. & Redf. Neg.* §§ 56, 58.

Facts must be established from which it can clearly be inferred that the defendant's negligence was the proximate cause of the injury.

BRONSON, J. This is an action to recover damages for personal injuries. On November 15, 1915, about midday, the plaintiff, a woman of seventy-one years, was struck and knocked down senseless by the automobile of the defendant, E. H. Cole, then being operated by his wife.

At the time the plaintiff was walking south upon the sidewalk along the easterly side of Broadway avenue, between the Great Northern tracks and the Viking hotel in the city of Fargo; Mrs. Cole was driving the automobile westward along the street that intersects Broadway avenue and extends up and beyond the Great Northern depot. As the plaintiff proceeded upon the cross walk at the intersection of such street and avenue, she was hit by such automobile then running at a speed not to exceed 4 or 5 miles per hour, and which theretofore, 60 feet of such crossing, was not exceeding a speed of 10 miles per hour; there was a clear, unobstructed view from such cross walk to the east along such street.

At the close of plaintiff's case the trial court granted a motion of the defendants for a directed verdict based upon absence of proof of defendant's negligence and upon the proof of plaintiff's contributory negligence and, from the judgment entered thereupon, the plaintiff prosecutes this appeal.

Plaintiff assigns as error the direction of such verdict, and other errors of law during the trial.

The record is short; the evidence meager. There is no evidence of any actionable negligence in the operation of such automobile at the time, contrary to the provisions of the speed ordinance of the city of Fargo, or at an excessive rate of speed.

The only serious question raised by this record is whether the defendant Mrs. Cole, after observing the position of the plaintiff on the

cross walk, owed a duty to her, in the exercise of ordinary care to avoid injury, to give warning by sounding the horn or ringing the bell, required by statute to be on such automobile; and whether the record discloses any issues of fact for submission to the jury, concerning the breach of such duty.

The evidence concerning this matter is to the effect that Milligan, a police officer of Fargo, was standing in front of the Great Northern Hotel, which is directly opposite from the place of the accident; that this is a busy part of the city, much traveled; that he was looking right at the car and saw the plaintiff; that he first saw Mrs. Cole, the driver of the car, about 60 feet east of the crossing, not exceeding a speed of 10 miles per hour; that she slowed down as she approached the crossing, and when she was about 20 feet therefrom the plaintiff started across; that the plaintiff saw the car and stepped back toward the railroad tracks; that then the automobile was going about 4 or 5 miles per hour. That the driver apparently saw Mrs. Vannett and then started ahead; that "Mrs. Vannett started across in front of the car, but when just about in front of it she stopped again, and the car hit her."

The plaintiff testified that she was walking very slowly on this cross walk and did not see or hear any auto, except that she saw one auto standing about 3 feet to her left.

The police officer further testified that he did not hear any ringing of any bell or blowing of any horn. Another witness testified that she saw the plaintiff walking very slowly and just ready to cross when the automobile hit her, and that the automobile came from toward the depot toward Broadway, and that it was not going awfully fast.

By statutory provision every automobile shall be provided with a bell or horn. Comp. Laws 1913, § 2972. This statute further provides that such bell or horn shall be rung or blown by the driver when operating outside of a city or village when approaching from behind a vehicle propelled by animals. Such provision, however, does not mean to imply that when an automobile is being operated within a city or village, upon the highways therein, that a horn or bell is a useless appendage, and that no duty in any case devolves upon the operator to use the same. *Forgy v. Rutledge*, 167 Ky. 182, 189, 180 S. W. 90.

"We can imagine no use to which a bell, horn, or other signal device attached to an automobile could be put, except to give suitable signals

of the approach of the machine where such signals would be necessary for the safety of persons traveling upon the highway, and manifestly the necessity for their use on the streets of a city or town is greater than in the country. The necessity for their use is implied from the provision requiring motor vehicles to be supplied with them. This proposition is too plain for argument." Ibid.

In *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233, the defendant came up from behind the plaintiff without blowing his horn. It was held that this made a proper case for the jury upon which they were warranted in finding that the defendant was negligent in not sounding his horn.

It is plainly the duty, therefore, of every automobile owner to make use of the horn or bell required by statute whenever under the circumstances, in the exercise of ordinary care, injury can be avoided to pedestrians, upon the streets or highways of the city by a timely warning given.

The operator of an automobile is not necessarily exempt from liability for injuries occasioned, in a public street of a city, by simply showing that, at the time, such automobile was not exceeding the limit of speed permitted by ordinance or law; there is still the duty imposed on such driver to anticipate that he may meet pedestrians on the public highways, who have a lawful right there to be, and for them he must keep a proper lookout, using his ordinary senses and instrumentalities then possessed, so as to avoid injuries to them. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Kathmeyer v. Mehl*, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Cas. 688; *Kessler v. Washburn*, 157 Ill. App. 532; *Ouellette v. Superior Motor Works*, 157 Wis. 531, 52 L.R.A. (N.S.) 299, 147 N. W. 1014, 6 N. C. C. A. 357; *Schnabel v. Kafer*, 39 S. D. 70, 162 N. W. 935.

The record presents a close question as to the existence of any evidence to raise an issue of fact concerning this duty of the automobile driver. However, the question of negligence becomes one of law, authorizing its withdrawal from the jury only when but one conclusion can be drawn from the undisputed facts; primarily and generally the question is one of fact for the jury. The law can only define the duty of individuals, under given circumstances. The existence of such cir-

cumstances is a question of fact for the jury. *Pyke v. Jamestown*, 15 N. D. 157, 168, 107 N. W. 359; *Heckman v. Evenson*, 7 N. D. 173, 182, 73 N. W. 427; *Solberg v. Schlosser*, 20 N. D. 307, 316, 30 L.R.A. (N.S.) 1111, 127 N. W. 91; *McGregor v. Great Northern R. Co.* 31 N. D. 471, 482, 154 N. W. 261, Ann. Cas. 1917E, 141.

In the record the evidence is in dispute as to whether the plaintiff saw the automobile of the defendants. If the jury found that the plaintiff did not see such car, then there arose a specific issue of fact whether the driver of the car under the circumstances failed to exercise due care by not giving a warning through the bell or the horn required, which might have avoided the injury; this was a question for the jury.

The court is also of the opinion that the question of whether the plaintiff was guilty of contributory negligence upon the record was fairly one of consideration for the jury. *McGregor v. Great Northern R. Co.* supra; *Felton v. Midland Continental R. Co.* 32 N. D. 223, 234, 155 N. W. 23; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Kathmeyer v. Mehl*, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Cas. 688; *Kessler v. Washburn*, 157 Ill. App. 532; *Spina v. New York Transp. Co.* 96 N. Y. Supp. 270; *Millsaps v. Brogdon*, 97 Ark. 469, 32 L.R.A. (N.S.) 1177, 134 S. W. 632.

The appellant also seeks to charge the defendant E. H. Cole with liability on the ground that he was the owner of the automobile at the time, and gave full consent to his wife to use it. There is evidence in the record that said E. H. Cole was the owner of such automobile and that his wife had permission to use the same whenever she so desired, and that if she was using it on November 15, 1916, it was with his consent.

This presented sufficient issuable facts for submission to the jury upon which the defendant E. H. Cole might be charged with liability under the doctrine of *respondeat superior*. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; *Campbell v. Arnold*, 219 Mass. 160, 106 N. E. 599; *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Norris v. Kohler*, 41 N. Y. 42, 1 Am. Neg. Cas.

324; Schreiber v. Matlack, 90 Misc. 667, 154 N. Y. Supp. 109; McHarg v. Adt, 163 App. Div. 782, 149 N. Y. Supp. 244; Berry, Automobiles, 2d ed. §§ 673, 677, 678. See Armstrong v. Sellers, 182 Ala. 582, 62 So. 28; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742. See note in 41 L.R.A.(N.S.) 775.

The appellant contends for the application of the doctrine of *res ipsa loquitur* upon which to predicate negligence of the defendants, based upon the manner in which the appellant was injured and the force with which she was knocked down by such automobile. The record discloses no evidence upon which this doctrine may be applied, for upon the record there is no presumption of negligence on the part of the driver arising from the mere fact that the appellant was run down and injured on a public street. Millsaps v. Brodgon, 97 Ark. 469, 32 L.R.A.(N.S.) 1177, 134 S. W. 632. See note in 32 L.R.A.(N.S.) 1177.

In view of the error of the trial court in directing verdict it is unnecessary to consider the other errors complained of.

The judgment of the trial court is reversed and a new trial ordered.

GRACE, J. I concur in the result.

CHRISTIANSON, Ch. J. I dissent. I believe the judgment should be affirmed.

BIRDZELL, J. (concurring specially). I concur in the result and in the reasons assigned therefor in the opinion of Mr. Justice Bronson. I express no opinion, however, upon the question of the liability of the defendant E. H. Cole, under the doctrine of *respondeat superior*. As I view the case, this question is not before the court for decision at this time.

FIRST STATE BANK OF NEW LEIPZIG, NORTH DAKOTA,  
a Corporation, Appellant, v. KELLOGG COMMISSION COM-  
PANY, a Foreign Corporation, Respondent.

(170 N. W. 635.)

**Conversion by mortgagee — of grain — chattel mortgage — description of land where crops are to be grown — notice to purchasers — or encumbrancers — must be sufficient to give — must be definite — certain as to identification.**

In an action for conversion by the mortgagee for the conversion of a certain quantity of flaxseed, the land upon which the crop is alleged to have been grown was described in one of the chattel mortgages as "*land in* section 25, township 134, range 91," and in the other as "*all the crops on land in* sections 18 and 31, township 134, range 90;" *held* that the description is too indefinite and uncertain to constitute notice to purchasers for value of crops which may have been grown upon such indefinite description of land.

Opinion filed December 27, 1918. Rehearing denied January 14, 1919.

Appeal from the District Court of Grant County, North Dakota, Honorable *J. M. Hanley*, Judge.

Affirmed.

*Jacobsen & Murray*, for appellant.

In granting a motion for a directed verdict, the order of the court must stand or fall upon the grounds specified in the motion. *Erickson v. Wiper*, 33 N. D. 193.

It is not necessary to allege a demand for possession of the property in conversion cases. *More Bros. v. Western Grain*, 31 N. D. 369.

A letter asking if possession of the property in question will be given, and stating that failure to answer will be deemed a refusal to deliver, is a sufficient demand, where a demand is necessary. No particular form of demand is necessary. *McFadden v. Thorpe Elev. Co.* 18 N. D. 93; 11 N. D. 280.

No demand was here necessary because defendant had waived demand and the record clearly shows a demand would have been unavailing. *Thompson v. Thompson*, 91 N. W. 44; 38 Cyc. 2035; 3 N. D. 284; 25 Pac. 219; *McFadden v. Thorpe Elev. Co.* 18 N. D. 93.

But a demand for payment of property alleged to have been converted is sufficient. *Guthrie v. Olson* (Minn.) 46 N. W. 853.

*F. B. Lambert*, for respondent.

Defendant was an innocent bailee of the grain after notice, and the acts of receiving the same and issuing storage tickets to him thereafter, followed by mingling the grain with other grain, were all and singular lawful acts of the defendant, done in the due course of business, and no action for conversion would lie for the same in the absence of a demand for the grain before suit. *Towne v. St. Anthony*, 8 N. D. 200.

"A defendant, in order to suffice as evidence of a conversion by him who has refused to honor it, must be so specific as to the property desired as to leave no doubt of its identity." *Bowers, Conversion*, §§ 30, 362.

The description in the chattel mortgage under which claim to the grain is here made, is too indefinite and uncertain to afford notice to third persons. A mortgage on grain grown on a certain section of a stated town and range, when only a part of such section is farmed by the mortgagor, and other portions by third persons, is not a sufficient description of the mortgagor's part to afford notice to others. *Com. Bank v. Elev. Co.* (S. D.) 85 N. W. 219; *Hammon, Chat. Mortg.* 58, 61; *Wood v. Minneapolis*, 48 Minn. 404; 11 C. J. 463, § 83-F.

"There is no presumption of law that the mortgagor is owner of the mortgaged property." *Warner v. Wilson* (Iowa) 5 Am. St. Rep. 710, 36 N. W. 719.

Insufficiency of the description in a chattel mortgage is a question of law. 11 C. J. 472, § 103; *Hagen v. Dwyer*, 36 N. D. 346, 162 N. W. 699.

In a conversion case, plaintiff must show actual damage before he can recover. *Lovejoy v. Merchants State Bank*, 5 N. D. 623; *Smith v. Donohue* (S. D.) 83 N. W. 264; *Force v. Peterson*, 17 N. D. 220, 116 N. W. 84.

GRACE, J. Appeal from the district court of Grant county, from an order denying a motion for a new trial, Honorable J. M. Hanley, Judge.

The action is one in conversion. In its complaint for first cause of action, the plaintiff, in substance, alleges that one Henry Ehlert exe-

cuted and delivered to the plaintiff two promissory notes, one for \$88, one for \$66, with interest thereon at 10 per cent from the date thereof, which it is alleged were secured by a chattel mortgage on all crops of every name, nature, and description sown, grown, raised, or harvested during the year 1916 upon section 25, township 134, range 91; that during the year 1916, Ehlert sowed, grew, raised, and harvested a crop of flax, upon said land, of 500 bushels or more, of the alleged value of \$1,000. For second cause of action, it is alleged that Ehlert executed and delivered to plaintiff a certain note for \$185, which, it is alleged, was secured by a chattel mortgage on all crops of every name, nature, and description sown, grown, planted, or cultivated and harvested during the year 1916 on sections 18 and 31, township 134, range 90 in Morton county, North Dakota; that Ehlert raised from said land during the year 1916, about 700 bushels of flax of the alleged value of \$1,500. It is alleged in the complaint that defendant wrongfully and unlawfully about the 10th day of October, 1916, converted all of said flax to his own use to the damage of the plaintiff in the sum of the notes, with interest from their date. Defendant, in its answer, exclusive of the admission of the corporation of the plaintiff, interposes a general denial to the allegations of the complaint.

The appellant makes but two assignments of error, *viz.*: First, the court erred in directing a verdict in favor of the defendant; second, the court erred in denying motion for a new trial. The appellant relies upon the first assignment of error. The defendant, at the close of plaintiff's case, made the following motion for a directed verdict, which was granted:

"The defendant at this time moves the court to direct the jury to return a verdict for the defendant on the ground and for the following reasons: First, that the complaint does not state facts sufficient to constitute a cause of action, in that no demand is alleged. Second, on the ground that the plaintiff has wholly failed to prove a cause of action against the defendant, for the reason that it has shown no proper demand for the possession of the said grain or any part thereof in accordance with law. Third, that the pretended demand which is alleged to have been sent through the mail is too indefinite and uncertain in its terms, it specifically demanding not only the grain raised and harvested by the man Ehlert, but by all other persons on said section, it



being definitely shown by the testimony that other parts of the sections of land described in the demand were occupied and in crop by other parties. Fourth, for the reason that there is absolutely no evidence to determine what portion of the flax alleged to have been taken to the defendant elevator was raised on the land described in one of the mortgages or the other, and that this is necessary under the showing. Fifth, that the description of the land on which the crops were to be grown on which a mortgage is claimed and on which this action is commenced, is too indefinite and uncertain, and does not therefore bind the defendant, who is an innocent purchaser for value; the description of the land being as follows: 'Also all the crops of every name, nature, and description, which have been or may be hereafter sown, grown, planted, or cultivated, and the crop harvested therefrom in the year of 1916 on land in section 25, township 134, range 91, west' as contained in exhibit 'F,' there being no description of the quarter section of land, or any other part of the section, and it not being shown affirmatively that the man Henry Ehlert had no interest in at least a half section of the said land, or any crops raised thereon; and exhibit 'E,' being more definite than that because it describes it as land in sections 18 and 31, township 134, range 90, and not describing any particular quarter, and it being affirmatively shown that the man Henry Ehlert only pretended to farm one quarter section of said two sections. On the further ground that the demand offered in evidence asks for and demands all of the grain raised by Henry Ehlert, or others, on section 25, in township 131, range 91, same not being the land described in the mortgage. On the further ground that the undisputed evidence shows that the attorney for the plaintiff has had in his possession or under his control, through the sheriff, all of the other property described in the mortgage and has never accounted therefor. . . . And on the further ground that the undisputed testimony shows that there never was a division of the grain, nor passing of title to the grain on division to the plaintiff. The Court: The motion is granted."

An examination of the motion for a directed verdict will disclose that several of the reasons set forth therein why the verdict should be directed were based upon the assumption that no legal or sufficient demand by the plaintiff of the defendant had been made for the flax in question. We think the testimony is sufficient to show a demand, if it

should appear that a demand would have been of any avail. The testimony of Sprecher is to the effect that he made a demand for either the storage tickets or the money for the same. We think the testimony shows quite clearly that the flax raised by Ehlert on the land described in the mortgages to plaintiff was hauled to the defendant elevator at New Leipzig. It is not necessary to review or set out such testimony. It is quite convincing in this regard. The plaintiff cashier, Sprecher, at a time which would appear from the testimony to be about the latter part of October or the first part of November of the year 1916, had several conversations with Shoenfeldt, the defendant's agent in charge of its elevator, which Sprecher demanded the storage tickets for such flax or the money therefor. We think a demand for the storage tickets was a demand for the flax, and that the defendant must have so understood it. In addition to the oral demands, plaintiff's attorneys, Jacobson & Murray, addressed to the defendant at New Leipzig, North Dakota, a written demand dated October 31, 1918, which written demand, it appears from the testimony, was inclosed in an envelop and with postage duly prepaid thereon and addressed to the defendant at New Leipzig, North Dakota. The defendant's agent, Shoenfeldt, testified in effect that he did not receive the letter. That the defendant did not receive such written demand is immaterial, as the testimony is sufficient, exclusive of it, to show sufficient demand by the plaintiff of the defendant for such grain. Again, we think it reasonably appears, from all the circumstances surrounding the case, that a demand would avail nothing and it would have been really useless to have made it. The defendant has answered the plaintiff's complaint and has thoroughly contested the plaintiff's right to recover on other grounds than the alleged failure to make a proper demand. We are of the opinion that it is perfectly clear, no matter in what form the demand had been made, it would have been declined. Under these circumstances, a demand is really unnecessary.

Defendant challenges the validity of each of the chattel mortgages on the grain on the ground that the description of the land in said mortgages, upon which the grain in question grew, is too indefinite and uncertain, and therefore not binding on the defendant on the ground that he is an innocent purchaser for value. There are two chattel mortgages each covering crops on this land. Each contains the following

provision: "Also all the crops of every name, nature, and description which have been or may be hereafter sown, grown, planted, or cultivated and the crop harvested therefrom in the year 1916." In one of the mortgages the land upon which the grain is grown is described as "*land in section 25, township 134, range 91 west,*" and in the other it is described as "*land in sections 18 and 31, township 134, range 90.*" This description, we are of the opinion, is entirely too indefinite and uncertain to constitute notice to purchasers for value of any crop which may have been grown on such indefinite description of the land. The description might mean, in the one case, a few acres in any part of section 25, and, in the other, a few acres in sections 18 and 31, or it might mean, in either case, several hundred acres or it might mean the entire section or sections. The description is so indefinite that one examining the records could not determine what land the crops were grown upon which were intended to be mortgaged. If the description had been all the crops of every name, nature, and description upon all of section 25 or all of sections 18 and 31, there would then have been a definite description of land. A description of land such as is contained in these chattel mortgages upon which the crops are mortgaged may be good as between the original parties to the mortgages, but it is too indefinite and uncertain to constitute notice to innocent purchasers for value. The description of land, crops upon which are mortgaged, should be sufficiently definite, in order to be notice to purchasers of such crops for value, that one examining the record could, with reasonable certainty, identify and know where the crop really is which is mortgaged.

In its motion for a directed verdict, the defendant also relied upon the proposition that the plaintiff had, in his possession or under his control, other property described in the mortgage exclusive of the crop which had been accounted for. The defendant, however, did neither plead nor prove the value of such property, nor ask, in its prayer for relief, that the plaintiff first be required to apply the value of all such other property upon the obligation sued upon before invoking liability against the defendant for the value of the flax in question. The defendant not having pleaded such facts, and having demanded no relief in this regard, it would be entitled to no relief upon the ground of the failure of plaintiff to account for the other property referred to.

This disposes of all the major questions presented in this case. The decision of any minor matters which have been discussed by either counsel would, in no way, affect the result at which we have arrived, and need not be further noticed. We hold the description of land upon which the flax in question was alleged to have been grown is so indefinite and uncertain that it is no notice to purchasers for value of any crop grown thereon.

For the reasons above stated, it was not error for the trial court to direct a verdict for defendant. The order of the trial court denying plaintiff's motion for a new trial is affirmed, with statutory costs of appeal.

CHRISTIANSON, Ch. J. (concurring). I concur in the conclusion reached in the opinion prepared by Mr. Justice Grace, viz., that the description of lands contained in the chattel mortgages is too indefinite to constitute constructive notice to a purchaser of the flax involved in this controversy.

The mortgages involved in this controversy do not state any specific kind of grain,—they cover “all crops of every name, nature, and description.” They do not purport to give definite descriptions of the lands on which the grain is growing, or is to be grown; neither do they state the number of acres intended to be covered by the mortgages. The land intended to be covered might have been 1 acre, 10 acres, 40 acres, or any other quantity which might be located within the section or sections mentioned in the mortgages. It might have been all in one contiguous tract, or it might have consisted of several noncontiguous parcels, situated in different parts of the section or sections mentioned in the mortgages. There is no showing that the mortgagor lived upon any of the lands in question, and there is no contention that he owned any part of them. The evidence offered by the plaintiff tended to show that the mortgagor during the year 1916 cropped some lands situated in the sections mentioned in the mortgages; that he raised and harvested some 50 acres of flax in Morton county, and some 40 acres of flax in Hettinger county; that he had a one-half interest in, and received one-half of, the flax raised in Morton county; and that he received the flax from the 25 acres of the 40-acre field in Hettinger county; and that the landlord received the flax from the remaining 15 acres.

A description of property in a chattel mortgage is generally considered sufficient if it enables a third person, aided only and directed by such inquiries as the instrument itself suggests, to identify the property. But, in determining the sufficiency of description of mortgaged personal property, the character of the property must be considered. A description sufficient as to ordinary personal property may be insufficient as to growing crops or crops to be grown. Such crops can be identified only by a description of the particular real property upon which they are growing or are to be grown. *Commercial State Bank v. Interstate Elevator Co.* 14 S. D. 276, 86 Am. St. Rep. 760, 85 N. W. 219. See also *Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & N. Elevator Co.* 48 Minn. 404, 51 N. W. 378; *Hagen v. Dwyer*, 36 N. D. 346, 162 N. W. 699.

As was said by the supreme court of our sister state: "It would be imposing too great a burden upon third parties to require them to ascertain, before purchasing grain offered in the open market, what real property the mortgagor was in possession of, and that such grain was grown upon land in the actual possession of such mortgagor. While third persons may be required to ascertain, at their peril, that grain offered for sale has not been grown upon certain premises fully described in the mortgages, they certainly cannot be required to do so when no such description is given." *Commercial State Bank v. Interstate Elevator Co.* supra.

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**THE SCANDINAVIAN AMERICAN BANK OF FARGO, North Dakota, a Corporation, Respondent, v. SIMON WESTBY, Appellant.**

(172 N. W. 665.)

**Bills and notes.**

1. The giving of a renewal note does not create an estoppel so as to prevent the urging against the renewal note any defenses which the maker of the renewal note may have had against the enforcement and collection of the original note. As between the original holder and maker of the note, where the holder of such original note or obligation has not parted with anything of value or assumed a more detrimental position by reason of the taking of the renewal note, any defense to or infirmity of the original note which might have been opened to

the maker of the original note, in the event he had been sued thereon, is equally open and retained to him where he has executed the renewal note and suit is brought upon the renewal note.

**Renewal notes.**

2. Bank stock is ordinarily presumed to be worth par until the contrary appears by competent evidence.

**Estoppel.**

3. Where one becomes surety upon a negotiable instrument, and, at the time of entering into the contract of suretyship, the holder of such negotiable instrument has additional security for the payment of the debt, such additional security is in the nature of a trust fund in the hands of the holder of such note to secure the payment thereof, and such holder must use ordinary care to protect such additional security and not permit such security to be lost, converted, or deteriorated by want of ordinary care, and must use ordinary care to properly preserve said security in order that the same may be applied to the discharge of the original obligation, or, if the original obligation is discharged by the surety, then such additional security should be protected, preserved, and cared for by the holder of the original obligation by the exercise of ordinary care and prudence with reference thereto, in order that the surety may reimburse himself from such additional security, he having discharged the original obligation.

Opinion filed September 9, 1918.

APPEAL from judgment of the District Court of Williams County, North Dakota, Honorable *Frank E. Fisk*, Judge.

Reversed.

*J. J. Murphy, H. W. Braatalien, Henry G. Middaugh, and Albert E. Coger*, for appellant.

The pledgee is bound to exercise the degree of care which an ordinarily prudent man usually bestows on his own property of like nature under the circumstances. *Jones, Liens*, 2d ed. p. 431.

When a chose in action such as a bond, note, or accepted order of a third person is transferred and delivered to a creditor as collateral security it is the duty of the pledgee to use reasonable care and diligence to make such collateral available. 22 Am. & Eng. Enc. Law, 2d ed. 899; *Phares v. Barbour*, 49 Ill. 370.

Where the party complaining has made no change in his position to his detriment, the doctrine of estoppel does not apply. *Grebe v. Swords*, 28 N. D. 330; *Pacific R. Co. v. Carr*, 159 Pac. 529; *Hutchins v. Stan-*

ley, 129 Pac. 1180; Casmer v. Hoskins, 128 Pac. 841; Southall v. Rigg, 11 C. B. 481; Edwards v. Chancellor, 52 J. P. 454; Bullion Min. Co. v. Cartwright, 10 Ont. L. Rep. 438; Compare Tuttle v. Smith, 5 N. B. 643; Kelly v. Allen, 34 Ala. 663; Cochrane v. Perkins, 148 Ala. 689, 40 So. 351; Dalton First Nat. Bank v. Black, 108 Ga. 538, 34 S. E. 143; Wheelock v. Berkeley, 138 Ill. 153, 27 N. E. 942; Tyler v. Anderson, 106 Ind. 185, 6 N. E. 600; Compare Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901; Commonwealth Ins. Co. v. Whitney, 1 Met. 21; Hooker v. Hubbard, 102 Mass. 239; Widger v. Baxter, 190 Mass. 130, 3 L.R.A.(N.S.) 436, 76 N. E. 509; Seager v. Drayton, 217 Mass. 571, 105 N. E. 461; Hunt v. Rumsey, 83 Mich. 136, 9 L.R.A. 674, 47 N. E. 105; Murphy v. Gay, 37 Mo. 535; Earle v. Robinson, 91 Hun, 363, 70 N. Y. S. R. 831, 36 N. Y. Supp. 178, affirmed in 157 N. Y. 683, 51 N. E. 1090; Casner v. Hoskins, 64 Or. 254, 128 Pac. 841, rehearing denied in 64 Or. 282, 130 Pac. 55; Geiger v. Cook, 3 Watts & S. 266; Adams v. Ashman, 203 Pa. 536, 53 Atl. 375; Mason v. Jordan, 13 R. I. 193; Central Bank etc. Co. v. Ford, 152 S. W. 700; Comings v. Leedy, 114 Mo. 454; Alabama Nat. Bank v. Halsey, 109 Ala. 196.

A pledgeor is not entitled to the return of the identical stock. 22 Am. & Eng. Enc. Law, 2d ed. at page 874; the rule is stated and cases cited.

*Pierce, Tenneson, & Cupler and Palmer, Craven, & Burnes*, for respondents.

A person primarily liable on an instrument is the person who by the terms of an instrument is absolutely required to pay the same. Comp. Laws 1913, § 7076; First Nat. Bank v. Meyer, 30 N. D. 388, 152 N. W. 657; Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888; 8 C. J. p. 620, note 19; German Am. Bank v. Watson, 163 Pac. 637.

Where both parties move for a directed verdict it is proper for the court to discharge the jury and decide all questions of law and fact. Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224; Jasper v. Hagan, 4 N. D. 1; Ruetell v. Insurance Co. 16 N. D. 546, 113 N. W. 1029; Bank v. Weber, 19 N. D. 705; Griffith v. Fox, 32 N. D. 650; Drexel State Bank v. Kittel (N. D.) 164 N. W. 152.

Where the court decides the questions of both law and fact, such

findings will not be reversed unless clearly shown to be against preponderance of the testimony. *Ruetell v. Insurance Co.* 16 N. D. 546, 113 N. W. 1029; *Bank v. Weber*, 19 N. D. 705; *Griffith v. Fox*, 32 N. D. 650; *Drexel State Bank v. Kittel* (N. D.) 164 N. W. 152.

A pledgee of stock is not liable if such stock depreciates in value through no fault of his. *Granite Bank v. Richardson*, 7 Met. 407; *Jones, Pledges*, § 606; *Little Rock Trust Co.* 90 S. W. 847, 3 L.R.A. (N.S.) 1200; *Culver v. Wilkinson*, 145 U. S. 205, 36 L. ed. 676, 680, 12 Sup. Ct. Rep. 832. See also *Jones, Collateral Securities*, §§ 434 & 728.

In questions of estoppel, if the deed or contract in question has in fact been ratified and the ratification is sufficient, there is no need of invoking the doctrine of estoppel. 31 Cyc. 1245-1250; *Capps v. Hensley* (Okla.) 100 Pac. 515; 8 C. J. pp. 444, 445, notes 17 & 18; pp. 724, 725, notes 43 to 46 and cases therein cited; *Comp. Laws* 1913, § 5865. See also *Comp. Laws* 1913, § 5866; *Lee v. McClellan* (Cal.) 52 Pac. 300.

One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration of the original note or of false representations by the payee, waives such defenses and cannot later set up to defend or reduce and recover on the renewal note. 8 C. J. pp. 444, 445, notes 17 & 18; pp. 724, 725, notes 43 to 46 and cases therein cited.

A contract which is voidable solely for want of due consent may be rectified by subsequent consent. *Comp. Laws* 1913, § 5865. See also *Comp. Laws* 1913, § 5866; *Lee v. McClellan* (Cal.) 52 Pac. 300; 16 Cyc. 787 to 791; *Hoyt v. McIntyre* (Minn.) 52 N. W. 918; *Daniels v. Cower* (Iowa) 3 N. W. 424; *Blight v. Schench*, 51 Am. Dec. 478; *Langdon v. Brown* (Pa.) 28 Atl. 921; *Jackson v. Lynn*, 58 Am. St. Rep. 366.

GRACE, J. Appeal from the judgment of the district court of Williams county, North Dakota, Honorable Frank E. Fisk, Judge.

The complaint states an action to recover upon a promissory note executed by defendant to plaintiff for \$2,320.64. The answer admits the execution and delivery of the note, but denies it was executed for valuable consideration. The defendant, in a very extensive answer, sets



out other defenses. To the answer there is a reply interposed. It is not necessary to set out the answer in full, but the substance of the answer is that on August 8, 1911, J. A. Stafne executed and delivered to plaintiff a promissory note for \$1,745.90, with interest at 12 per cent payable November 1, 1912. At the time the note was executed, there was pledged to plaintiff as collateral security to said note, certain stock certificates of the Citizens State Bank of Alexander of the par value of \$100 per share. The answer further states that in the year 1913, A. J. Stafne was the owner of twenty-five shares of the corporate stock of the Williston State Bank of the par value of \$100 per share. It is claimed by the defendant that about the 1st day of August, 1913, A. J. Stafne gave defendant an option to purchase the twenty-five shares of the corporate stock of the Williston State Bank, with the understanding that if the same were purchased by the defendant the purchase price thereof should be applied upon indebtedness of A. J. Stafne to the Williston State Bank of which the defendant was president, director, and stockholder.

The defendant further alleges that the par value of said twenty-five shares of the Williston State Bank stock was \$2,500. Defendant alleges that the plaintiff falsely and fraudulently represented to the defendant that the plaintiff was holding the stock certificates of the twenty-five shares of stock of the Williston State Bank as collateral to a debt evidenced by the promissory note upon which this action is brought, and that plaintiff further fraudulently and falsely represented unless defendant signed the note upon which this action is brought, the plaintiff would not deliver possession of the twenty-five shares of stock of the Williston State Bank to defendant; that the defendant relied upon the false representations made by the plaintiff, and believed them to be true and was thereby induced to execute the promissory note involved in this suit. Defendant further alleges that the plaintiff, at the time of making such false and fraudulent representations as to his right to the possession of said corporate stock, did not hold the same as collateral security or have any right to the possession thereof, as against A. J. Stafne or the defendant, and that A. J. Stafne was then the owner of said stock and entitled to the immediate possession thereof. Defendant further claims that the plaintiff represented to the defendant that the defendant was fully pro-

tested in signing said note by reason of the fact that the same was secured by the corporate stock of A. J. Stafne of the Citizens State Bank of Alexander of the par value of \$2,000. The answer sets forth the disposition of the twenty shares of stock of the Citizens State Bank of Alexander and the assignment and transfer thereof by the plaintiff, and alleges the par value thereof to be the sum of \$2,000, and alleges the actual value thereof to be \$2,500. The defendant admits the execution, on March 25, 1914, of a note for \$2,205 bearing 8 per cent interest and due in ninety days after date, and alleges this note was given for the amount then claimed to be due on the \$1,745.90 note, the payment of which he had guaranteed. Defendant claimed that he signed such note on account of the assurances made by the plaintiff on November 28, 1913, that all the matters connected with the affairs of the Citizens State Bank at Alexander would be adjusted, and similar assurances at the time of the execution of the guaranty by the defendant that the stock of said bank afforded abundant security for the loan guaranteed by the defendant and the cause of the expectation of the defendant that said bank stock would be accounted for by plaintiff, and, when accounted for, that the value of the stock would exceed the amount of defendant's obligation, and because he knew that the defendant's obligation was being carried as an asset by plaintiff's bank; that renewal was necessary from time to time in order that it might be considered suitable bank paper, he executed renewals of the original obligation, and further alleges that the fact of defendant's expectation that plaintiff would account for said collateral and his continued reliance thereon was, at all times, from the 28th day of November, 1913, well-known to the plaintiff. The answer then sets out all the matter alleged therein from ¶¶ 3 to 12, both inclusive, and realleges them by way of counterclaim.

The plaintiff, in its reply, alleges the delivery of the note to it on August 8, 1911, by J. A. Stafne, and the pledging therewith at that time, as collateral security thereto, the twenty shares of stock of the Citizens State Bank of Alexander. The reply further alleges, in substance, that the consideration of the delivery to the defendant by the plaintiff of twenty-five shares in the Williston State Bank was the guaranty of the payment at maturity, of the note sued upon; that said guaranty was indorsed upon said note and was in the following words:

"For value received, I hereby guarantee the payment of the within note at maturity or any time thereafter, with interest at the rate of 12 per cent per annum until paid, waiving demand, notice of payment, and protest," which guaranty was signed by the defendant.

It is further alleged, in substance, that the defendant then and there agreed that the said stock certificates were to be sold and the proceeds paid to plaintiff to take up said note; that plaintiff would sell such stock; that the proceeds were not remitted to plaintiff or received. The reply further, in substance, alleges the financial difficulty of the Citizens State Bank of Alexander; that the sale of said bank or the stock therein was being negotiated by the majority stockholders; that the defendant held stock in the Citizens State Bank of Alexander; that it was understood between the plaintiff, then officer of the plaintiff bank, and defendant, that said stock certificates representing twenty shares of the capital stock of the Citizens State Bank of Alexander, held by the plaintiff as collateral security, should be delivered to the plaintiff A. J. Stafne for the purpose of taking the same to Alexander, North Dakota, and having the same transferred or reissued upon the reorganization of said bank and to return the same to the plaintiff; that said stock certificates were never returned to the plaintiff, and that the delivery thereof to the said Stafne was made at the request of the defendant and with his full knowledge, consent, and approval. The reply further, in substance, alleges the execution of a note on March 25, 1914, for \$2,205, and one on November 20, 1914, for \$2,320.64. Each of said notes was claimed to represent the amount due upon the \$1,745.90 note, the original obligation, at the respective dates of their execution. Defendant further, in his reply, alleges, in substance, that on August 18, 1915, plaintiff and defendant made a full settlement of all matters and differences between them arising out of the transactions aforesaid on said date, and an agreement, in writing, was executed between the parties wherein the defendant agreed that the note described in the complaint was and is a valid obligation of his, and that it was and is due thereon, the full amount of said note for principal and interest as is shown thereby, subject only to credit to be thereafter made of the actual cash value of twenty shares of the capital stock of the Citizens State Bank of Alexander on the date said bank was sold or the stock of Eric Stafne therein was transferred by

him. The defendant therein agreed to pay the amount due upon said note as such credit on or before November 15, 1915, and that the title to said stock and the right to sue for, recover, and retain the value thereof or the proceeds of any sale thereof, should be vested in plaintiff; that it was therein agreed that the value of said stock would be determined by arbitration; that there were to be three arbitrators,—one selected by the plaintiff, one by the defendant, and the two to select the third; that the plaintiff selected its arbitrator and then advised the defendant thereof; that such arbitration was never completed. That the value of the said twenty shares of the stock in the Citizens State Bank of Alexander, at the time aforesaid, was not to exceed the sum of \$350. A concise statement of the facts is as follows:

J. A. Stafne and A. J. Stafne were the principal stockholders of the Citizens State Bank of Alexander, in which they were directors and officers. Eric Stafne is their father. H. J. Hagan is their uncle, and H. J. Hagan and Eric Stafne are brothers-in-law. The Citizens State Bank of Alexander was organized in 1909 with a capital stock of \$10,000. Hagan held \$1,000 of stock. The Citizens State Bank of Alexander later became involved in financial difficulty, the exact time when such financial difficulty commenced being somewhat in dispute. The plaintiff claimed it was early in January, 1912, and the defendant that it was after the note dated November 23, 1913, was signed. On the 23d day of November, 1914, the state bank examiner took charge of the bank and required that \$17,000 of doubtful paper be replaced, and that John and Albert Stafne sever their connections with the institution. Eric Stafne paid, in cash, \$17,000, and took the paper to which objection had been made by the bank examiner.

H. J. Hagan was connected with the Scandinavian Bank of Fargo, the plaintiff, and was the manager thereof. J. A. Stafne and A. J. Stafne made a loan from the plaintiff for \$1,745.90, to which was pledged as collateral security \$2,000 of the stock of the Citizens State Bank of Alexander, and the defendant claims \$1,700 and the plaintiff \$2,500 of the stock of the Williston State Bank was also pledged as collateral security to such note. A. J. Stafne was also interested in the Williston State Bank and had twenty-five shares of stock therein, which was the stock turned over to Westby by plaintiff.

The \$1,745.90 note was not paid at maturity and it was renewed

three different times. The first time was on November 28, 1913, when Simon Westby and Albert J. Stafne executed a renewal note for \$2,148.25. The second note was March 25, 1914, for \$2,205, signed by the same parties. The third renewal, signed by the defendant only, was for \$2,320.64, dated November 20, 1914, and is the note upon which suit is brought.

The first point which we consider is whether or not the defendant, by the giving of the renewal notes from time to time, is estopped to urge any defenses which he may have had against the enforcement and collection of the original note, to renew which renewal notes were executed. In other words, if there existed any infirmity in the original note, after the defendant has executed renewals of the original note is he estopped to set forth and rely upon the original infirmity or defense which he had, if any, to the original note? We are of the opinion that as between the original parties to the obligation where the holder of such note or obligation has not parted with anything of value, or assumed a more detrimental position by reason of the taking of a renewal note or obligation, that any defense or infirmity defendant might have taken the advantage and benefit of if he had been sued upon the original obligation, is equally open and retained to him where he has executed renewal note or notes, and suit is brought upon the renewal note, and there is no good reason why this should not be so. The renewal note or obligation is but the old note or obligation which is extended in the form of the renewal note. The renewal of notes may be said to be of as much benefit to the holder as to the maker thereof; while the renewal, in almost all cases, operates to extend the time of payment to the maker, the holder is benefited by having live paper which is of more use in the business world than past-due paper, and, with these and a few other minor differences, the renewal note is the same obligation as the original note. *Grebe v. Swords*, 28 N. D. 330, 149 N. W. 126.

It is true several courts notably among them Arkansas laid down the rule substantially that a renewal of a note, with knowledge that the original was without consideration, would prevent any inquiry into the facts, and hold that the renewal operates as an estoppel for the reason that the renewal note is a written acknowledgment of a debt, with knowledge that no debt existed. This rule, as we view it, does not

appeal to us as being based upon sound reasoning, nor does it appeal to our sense of justice. If when a renewal note is given, the position of the parties is the same as at the time of the giving of the original obligation, and there was no consideration for the original note, the fiat of the court cannot instill a consideration into the renewal note. In other words, the court, by judicial fiat, cannot create something out of nothing.

The second important point is the value of the twenty shares of the bank stock of the Citizens State Bank of Alexander. We think it is a fair presumption that the bank stock is at least worth par. There is no evidence introduced that would, in any way, disturb this presumption. In fact, most of the evidence that was introduced would have the tendency to sustain this presumption; as, for example, where it is shown by the evidence that Eric Stafne put in \$17,000 in cash to take up certain bad paper ordered out of the bank by the bank examiner.

The presumption would necessarily follow that there was no more bad paper in the bank, and that the bank was solvent and the bank stock worth at least par. As the record now stands, we must hold that the bank stock of the Citizens State Bank of Alexander was worth par, and even if Eric Stafne had not put in the \$17,000, the presumption would, nevertheless, be entertained that the bank stock was worth par until the contrary was made to appear by competent evidence.

The third and last point relates to the conversion by the plaintiff of the collateral; to wit, the bank stock in the Citizens State Bank of Alexander. This is the most important point of the case, and involves an examination and construction of that part of the Uniform Negotiable Instruments Law, in its relation to the subject we are examining. It must be conceded that the relation of Westby to the plaintiff, the holder of the note, was that of surety. This is the most favorable relationship to the plaintiff that, it may be conceded, defendant occupied. Defendant's relation on the original note was that of guarantor. However, under our statutes, we think it is immaterial whether the relation of the defendant is considered that of a guarantor or a surety, in view of § 6682 of the Compiled Laws of 1913, which provides that a surety has all the rights of a guarantor whether he becomes personally responsible or not.

Section 7004 of the Uniform Negotiable Instruments Act is as follows:

"A negotiable instrument is discharged:

- "1. By payment in due course by or on behalf of the principal debtor.
- "2. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation.
- "3. By the intentional cancelation thereof by the holder.
- "4. By any other act which will discharge a simple contract for the payment of money.
- "5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

In § 7005, discharged secondarily.

"A person secondarily liable on the instrument is discharged:

- "1. By any act which discharges the instrument.
- "2. By the intentional cancelation of his signature by the holder.
- "3. By the discharge of a prior party.
- "4. By valid tender of payment made by a prior party.
- "5. By a release of the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved.
- "6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."

Since both parties, in the case, have treated the defendant's relation as one of suretyship, we shall use the term "surety" in our further discussion.

The claim of the plaintiff, in short, is that Westby, being a surety, his liability is a primary one, and nothing the plaintiff might do by way of surrender of collateral or the extension of time without the knowledge or consent of the surety would, in any manner, cause the plaintiff any liability to the defendant. In other words, the plaintiff's claim amounts to this,—that the holder of the note, to secure the payment of which there was admittedly abundant collateral security, and, at the same time having a surety on the note and knowing him to be such, may act with a free rein. He may turn the collateral back to the original debtor, or may otherwise dispose of it; may extend the time of payment, and, in fact, act with entire disregard as to the rights

of the surety and with total disregard to his liability as a trustee without incurring any liability on his part,—all on the theory that primary liability of the surety relieves the holder of the note from all liability and responsibility to the surety arising out of any collateral security to the original note, or arising out of the extension of the time of payment of the original note, or in any other manner. If the Uniform Negotiable Instruments Act, as applied to this situation, means that the holder of the note, although he has abundant collateral security for his note, other than that of the surety, can deliberately dispose of the collateral or return it to the original debtor, or otherwise disposing of it, and can extend the time of payment without knowledge or consent of the surety, all without incurring any liability on his part to the surety, it appeals to our sense of fairness and justice in just about the same proportion as a strangle-hold, where, in a contest of strength and science, one wrestler secures this deadly hold and, slowly but surely, chokes his opponent into insensibility. We do not believe that primary liability of a surety means what several of the courts have said it means.

As a general rule, the surety signs the original note or instrument, and is thus an original promisor, and if the original instrument has consideration, that is, if the consideration of the original instrument is sufficient to uphold the contract of surety, in such case, the surety is an original promisor and may be sued upon default occurring in the note or instrument which he signed. His liability may thus be considered a primary one. In the consideration of this case, we will assume and consider the liability of the defendant a primary one. Having in this case arrived at the conclusion that the defendant is a surety, and assuming that his liability is a primary one, the next point to analyze is whether § 7004 of the Compiled Laws of 1913 repeals all our laws relative to suretyship, either directly or otherwise. The merest inspection of such section determines that it does not directly attempt to repeal any of our statutory laws relative to the rights, duties, and remedies of surety. The law does not favor the repeal of existing law by mere implication, and even if it did we find no basis, in said section, from which it might be inferred that the repeal of the laws concerning suretyship was implied. A careful examination of § 7004, *supra*, discloses that the five ways therein specified in which a nego-



negotiable instrument may be discharged do not apply exclusively to the maker of the note, but some of the subdivisions of said section apply also to the holder. The first subdivision implies that a negotiable instrument is discharged by payment in due course, by or on behalf of the principal. The second subdivision is by payment in due course by the party accommodated. The third is by intentional cancellation by the holder. The fifth, when the principal debtor becomes the holder of the instrument in his own right. It is self-evident that the negotiable instrument would be discharged under such circumstances. That would be true if there were never any law enacted upon the subject. The fourth subdivision of said section, however, is not so easily understood or so simple of construction. It is as follows: "By any other act which will discharge a simple contract for the payment of money."

Keeping in mind the other subdivisions of said section, that the negotiable instrument may be discharged by certain acts not only of the maker but by the holder, we believe the language of subdivision 4 applies to both the maker and the holder. There may be other ways than those set forth, whereby the maker may show that the negotiable instrument is discharged. For instance, that the contract was fraudulent or obtained under duress. The surety being primarily liable and an original promisor, the holder of the note might do certain acts which would operate to discharge the liability of the surety on such note, and thus discharge the instrument so far as the surety is concerned. If the law of suretyship has not been repealed, and we hold that it has not, if the holder of the note should, without the knowledge or consent of the surety, extend the time of the payment to a time certain, so far as the surety is concerned, the contract and instrument, being a simple one for the payment of money, is discharged. Again, if the holder of the note, at the time of the signing thereof by the surety had taken collateral security from the principal debtor, it must be held that he holds such collateral in trust, and if the surety pays the obligation, he is entitled to stand in the shoes of the creditor and reimburse himself by having such collateral applied in reduction of the amount of money which the surety has paid the holder.

The holder of the note is under no obligation to first realize on the collateral before suing the surety. The holder may proceed against the surety without having first realized upon the collateral security,

for the reason that the surety's liability is a primary one, but the holder must, nevertheless, be faithful to his trust in preserving the collateral, and must use ordinary care and vigilance to preserve it, and must not dispose or convert it; and if the collateral is realized upon, the value thereof must be indorsed upon the note.

Suretyship, in its narrow sense and as applicable to this case, is defined in 32 Cyc. page 14, as follows: "Suretyship, in its narrower sense, is a legal relation based upon contract between competent parties, in which one person undertakes as the object of such contract to answer to another for the debt, default, or miscarriage of a third person; the third person's liability to the second person being thus similar to that of such first person."

Section 6675 of the Compiled Laws of 1913 defines suretyship as follows: "A surety is one who at the request of another and for the purpose of securing to him a benefit becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor."

Section 6676 of the Compiled Laws of 1913 is as follows: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal."

Section 6677 of the Compiled Laws is as follows: "A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach he cannot in any case be liable for more than the penalty."

Subdivision 2 of § 6681 of the Compiled Laws of 1913 is as follows:

"How exonerated. A surety is exonerated:

- "1. In like manner with a guarantor.
- "2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or
- "3. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do."

Section 6683 provides that the surety may require his creditor to

proceed against the principal, and, if the creditor neglects to do so, the surety is exonerated.

Section 6686 provides that when a surety has satisfied the obligation of the principal, he is entitled to enforce every remedy which the creditor then had against the principal, until he is reimbursed for what he has expended. He can also require a contribution from co-sureties.

Section 6687 provides: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him afterwards, whether the surety was aware of the security or not."

Section 6688 provides: "Whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation."

Have all these various provisions been abrogated by the Uniform Negotiable Instruments Act? We are certain they have not, and that they still stand as the law of this state with reference to suretyship, and were never intended to be repealed, and were protected under subdivision 4 of § 7004.

In the case at bar at the time of the signing of the original note, the plaintiff knew that the defendant was a surety. He had like knowledge at the time of the signing of each renewal note, including the note sued upon. The relation of the defendant was, at all times, one of surety. At the time the original note was signed, the plaintiff held, among other collateral security, twenty shares of the Citizens State Bank of Alexander, and twenty-five shares of the Williston State Bank. All this security was itemized on the back of the note which the defendant originally guaranteed and just above the guaranty of the defendant. All parties had knowledge of the collateral which was deposited with the plaintiff to secure this same debt.

What, then, was defendant's contract at the time of the signing of the original note? What, then, was in contemplation and what was the understanding and agreement at that time? So far as the defendant is concerned, we think it must be conceded that, there appearing to have been sufficient collateral security to cover the payment

of the original obligation, and this fact being well-known to both the defendant and the plaintiff, it was the main inducement of the defendant in signing the note, and this consideration was at the very basis of the contract and the plaintiff knew it. The plaintiff must have known that the collateral security at the time of the signing of the original note, being sufficient to pay the original debt, was the inducing cause for defendant to attach his name as further security for the payment of the original debt. All of this was well-known to the plaintiff, for he had full knowledge of all the security which he held as collateral to the original debt. The defendant having entered into the contract under these conditions, can the plaintiff, without the consent and against the will of the defendant, in effect change the terms of such contract so as to impose upon defendant a greater liability than was assumed by defendant at the time he entered into the contract? Can the plaintiff dispose of all the collateral security or fail to exercise ordinary diligence so that the value of the security is largely diminished, or show that the same becomes of no value and thus make the defendant liable practically for the whole debt, when at the time of the signing of the contract, if the collateral were properly taken care of and used in the payment of the debt or preserved by the plaintiff for defendant in case defendant paid the debt, there would be practically no loss to the defendant? To hold that the plaintiff could do so would be to hold that the plaintiff could add other obligations to the contract which did not exist at the time of the making of the contract, and which were not in the contemplation of either party, and especially were not in the contemplation of the defendant.

We believe the contract in its inception that was in the minds of the parties was that if default were made in the payment of the principal obligation by the debtor, and the defendant was compelled to pay it, all the collateral security would be preserved to defendant and all the rights of the creditor turned over to the defendant, that he might reimburse himself for the money which he had paid out to satisfy the original obligation. This must also have been in the minds of the plaintiff. It could hardly be otherwise, he having full knowledge of the collateral security and having possession thereof. The defendant entered into the contract to pay the original obligation or discharge the original instrument with all these considerations in mind, all of which

were well-known to the plaintiff. The collateral security was held by the plaintiff in trust for the payment of the original obligation, or if the original obligation were paid by defendant, the collateral was held in trust to be turned over to him, if the defendant were compelled to pay the original obligation. If the plaintiff converts such collateral security to his own use, the instrument is discharged to the extent the collateral security has been decreased in value by failure of the creditor to exercise ordinary diligence in preserving the security; or if, after notice by the surety to proceed against the principal, and the principal fails to do so, the instrument is discharged to the extent of the damages which the defendant may show by reason of the creditor's failure to proceed. In other words, the contract which the defendant entered into is discharged to the extent herein indicated, and where action is brought on the original instrument, or where an action is brought against the surety by the original holder, it is proper to set up and plead such damages, if any, by way of counterclaim, as a cause of action against the plaintiff.

If the creditor extends the time of payment to a time certain, without the knowledge or consent of the surety, such extension operates to discharge the surety from his contract, and to discharge the instrument so far as the surety is concerned. It is simply another way in which under subdivision 4 of § 7004, a simple contract for the payment of money may be discharged, and there is no reason why this should not be so; for to hold that the surety can be held on a note which has been extended to a time certain without his knowledge or consent is to hold that he can be held on a contract which he never made. To illustrate:

Supposing A executes a note to B for \$1,000 which A owes B. The note is due one year from the date of its execution. C signs the same as surety. At the time A executes the note he is worth \$20,000. At the maturity of the note, A and B, without the knowledge or consent of C, extend the time of the payment of the note for five years to a time certain. During such five years, B cannot maintain an action against A for the recovery of the debt. During the five years A becomes bankrupt. Should C be held to pay the debt? It is evident that if the suit had been brought at the end of the year when default was made in the first note B would have gotten his money and C would not have suffered, but, by the extension of time, a new contract between

A and B was made in which C was not a party and C's loss is also by reason of the new contract to which he is not a party. What sensible or just reason is there, if any, why C should not be discharged from his contract on such instrument? There can be none and there is none, for the circumstances and conditions which compel C's loss are not the conditions to which he contracted.

The contract has been, in fact, changed without his consent, and he is discharged from the instrument and from liability, and we hold that such a condition was contemplated under subdivision 4 of § 7004, to discharge one from a simple contract for the payment of money where the circumstances, we have above illustrated, exist.

We hold that all the rights of suretyship, the right of subrogation, are all brought under subdivision 4 of § 7004. This is the only reasonable construction to be placed upon such section. In this connection it must not be lost sight of that § 6943 of the Compiled Laws of 1913 provides as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."

If a negotiable instrument is taken in due course of business in the belief that all the signers of such note are makers, and with no knowledge by the one who takes said note that any of the signers thereon are sureties, the surety could claim no benefit by reason of his relation as a surety instead of maker, until knowledge of the suretyship is brought home to the holder of the note. If, however, a holder in due course has knowledge of the suretyship and has collateral security for the payment of the debt from the time he acquired such knowledge, he is in no different position than any other holder of the note, and must have due regard to the rights of the surety, and exercise ordinary diligence to preserve the collateral security. He must bear in mind that a surety cannot be held beyond the express terms of his contract.

The plaintiff also claims that the defendant had knowledge of the necessity for the transfer of the stock for the Citizens State Bank of Alexander and of the plaintiff's intention to surrender the stock for the purpose of having new stock issued, and for this reason the defendant cannot be heard to complain. As we view this matter, plaintiff held the stock of the Citizens State Bank of Alexander as collateral security, and he was trustee of it; and while the same was collateral

to a debt which was owing him, he also held it as trustee for the defendant, who was surety. Plainly it was the plaintiff's duty to protect the rights of the surety and to use ordinary diligence to preserve the security. This was his duty whether the defendant had knowledge of it or not. The plaintiff also had the possession of the collateral, the bank stock in question, and it was his duty to keep possession of it and preserve it in order that defendant might have the benefit of it if he were compelled to pay the debt.

It is clear the defendant did not authorize or consent to the conversion of the collateral by any person, and if the defendant did have knowledge that the plaintiff was turning the stock over to Eric Stafne for the purpose of having it reissued in the form of new stock, this knowledge would, in no manner, relieve the plaintiff from the necessity of accounting to the defendant for the value of said stock if plaintiff should pay the obligation to which such stock was collateral.

The defendant did not consent to the conversion of the stock by Eric Stafne or anyone else. The defendant admits his liability upon the note sued upon and counterclaims for the value of twenty shares of the Citizens State Bank of Alexander which have a par value of \$100 per share, there being no evidence to controvert the presumption that the stock is worth par.

We are of the opinion that such counterclaim is a proper one, and, under the evidence as it now stands, the defendant should have judgment for the value of the twenty shares of stock of the Citizens State Bank of Alexander at par, with interest thereon at the legal rate since the date of the conversion of said stock.

We are of the opinion that the matters disputed as a counterclaim were available by way of defense. From this view of the case, the only judgment plaintiff is entitled to is the excess of the note and interest over and above par value of the stock, with interest at the legal rate since the conversion.

Though the surety is primarily liable that does not relieve the creditor or the holder of the note from liability if he does not use ordinary diligence in preserving the security which has been hypothecated to secure the payment of the note, nor (in the opinion of the writer), can the creditor and the principal debtor, by agreement between themselves without the knowledge or consent of the surety, extend the time

of payment to a time certain, thus, in effect, making a new contract, and if such is done the liability of the surety, in my opinion, ceases.

While the members of the court disagree upon some of the questions, and the views expressed in this opinion are not shared by a majority of the court, a majority are agreed upon the final disposition of the case.

While, as already stated, it is presumed that the bank stock was worth par, and judgment might properly be ordered upon that theory, still a majority of the court believe that it is fairer to remand the case and permit the parties to litigate the question of value. This, however, is the only question to be litigated, as it would be unfair to compel the parties to relitigate any of the other issues. The value of the stock is to be determined as of the date when the plaintiff placed it beyond its control and permitted it to be appropriated by Eric Stafne. Appellant is entitled to the statutory costs on appeal.

CHRISTIANSON, J. (concurring specially). I concur in a reversal and a remand of the case for the purpose of a trial upon the question of the value of the bank stock; but I do not concur in all that is said in the opinion prepared by Mr. Justice Grace, and I entirely disagree with him in so far as his views are at variance with the principle announced by this court in *First Nat. Bank v. Meyer*, 30 N. D. 388, 152 N. W. 657.

And, while I do not believe that the rule announced in *First Nat. Bank v. Meyer*, supra, is applicable to or involved in this case, I deem it proper to observe that that decision represents the deliberate judgment of this court as then constituted upon a question argued and deemed to be decisive of that case. The Negotiable Instruments Act was adopted by the different states to secure uniformity on the important subjects covered by the act. This being so, not only should the rule of *stare decisis* apply with full force, but great weight ought to be given to the harmonious decisions of other states, construing provisions of the act. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525. The principle announced in *First Nat. Bank v. Meyer*, supra, is sustained by the overwhelming, and practically unanimous, weight of judicial authority. See authorities cited in *First Nat. Bank v. Meyer*, supra. See also *Union Trust Co.*



v. McGinty, *supra*; German American State Bank v. Watson, 99 Kan. 686, 163 Pac. 637; Graham v. Shephard, 136 Tenn. 418, 189 S. W. 867, Ann. Cas. 1918E, 804; Niotaze State Bank v. Cooper, 99 Kan. 731, 162 Pac. 1169. The great unanimity with which courts in other states have announced and adhered to the rule, both prior to and subsequent to the decision in First Nat. Bank v. Meyer, is at least persuasive evidence that First Nat. Bank v. Meyer was decided correctly.

As already stated I do not believe that the rule announced in First Nat. Bank v. Meyer is at all involved in this case. It is true the plaintiff in its brief argues that the defendant is primarily liable, and cites First Nat. Bank v. Meyer, in support of its argument. But the defendant does not deny this, or question the correctness of First Nat. Bank v. Meyer. Neither does the defendant contend that he is discharged from liability upon the note by reason of plaintiff's surrender of the collateral security. On the contrary, defendant concedes liability on the note, and merely asks that the damages which he has sustained by reason of plaintiff's breach of contract be offset against the amount due on the note. In his brief defendant says: "This is a suit on a promissory note and the indebtedness is admitted in the answer, but there is a counterclaim for the value of the collateral security which the defendant says the plaintiff converted." And in defendant's reply brief the same proposition is most emphatically adhered to. He says: "We did not urge that the passive negligence of Hagen (the president of the plaintiff bank) when Stafne seized the stock, and his ratification of Stafne's forcible annexation of it, in face of Westby's warning, and in disregard of his duty as a bailee . . . discharged Westby. *We interposed plaintiff's conversion as a counterclaim and offset, not a defense.* We did not urge that the fact that Hagen permitted Stafne to take and keep twenty shares of bank stock of which he was trustee and which he was under legal duty to preserve with "at least ordinary care, discharged Westby. . . . We urged his neglect of duty as a bailee and his presentation of the stock to another as a counterclaim. . . . It is 'to the extent to which he is prejudiced' upon which the counterclaim is based." There should be no difficulty in understanding defendant's position. It could not have been stated more clearly and unequivocally.

The evidence shows that the original loan was made for \$1,745.90.

It was evidenced by a promissory note for that amount signed by J. A. Stafne, dated August 8, 1911, payable November 1, 1912. The note was secured by collateral consisting of stock in the Williston State Bank of the par value of \$2,500, and stock in the Citizens State Bank of Alexander of the par value of \$2,000. The certificates in the latter bank were in the name of J. A. Stafne, but the certificates in the Williston State Bank were in the name of A. J. Stafne. The two Stafnes were brothers and both interested in the Citizens State Bank of Alexander. About two years thereafter the defendant Westby acquired the interest of John and Albert Stafne in the Williston State Bank Stock so pledged to and held by the plaintiff as collateral. Arrangements were made whereby the plaintiff bank agreed to release the Williston State Bank Stock in consideration of Westby's signing with Albert Stafne a renewal note for the amount of the principal and interest accrued on the original note. Such renewal note was executed by Westby. It bears date November 28, 1913. This latter note was renewed on March 25, 1914. It was again renewed on November 20, 1914, when the note involved in this action was executed. It is undisputed that Westby was not a party to the original transaction, and that the renewal notes included no consideration except the principal and accrued interest on the original loan. It is also clearly established that Westby executed the note dated November 28, 1913, with the absolute understanding that the \$2,000 stock in the Citizens State Bank of Alexander would continue to be held by the plaintiff as collateral security, as well as with the assurances of Mr. Hagan that such stock furnished ample security for the payment of the indebtedness. It is also established that Westby executed the renewal note involved in this action, with the continued understanding that the bank stock should remain security as before. Thereafter the Citizens State Bank of Alexander got into financial difficulties, and the State Examiner required that John and Albert Stafne sever connections with the bank, and that \$17,000 of notes of doubtful value be replaced. One Eric Stafne took the objectionable notes, and paid into the bank in place thereof \$17,000 in cash. After this replacement had been made the plaintiff bank permitted the bank stock which it held as collateral security to come into the hands of Eric Stafne, and, after new certificates had been issued in his name, Stafne sold and transferred them to

others. The evidence leaves no room for doubt but that it was always the understanding of the plaintiff and defendant as well as of Eric Stafne that the bank stock should remain as collateral security for the note involved in his action.

While it is true that, "except where it is otherwise provided by statute or by agreement of the parties, the fact that plaintiff holds collateral security for the instrument sued on, which he has not resorted to or attempted to enforce, or which he has not returned, or that he has been so negligent in disposing of such collateral that the maker would have a cause of action against him therefor, is not a good defense to an action at law" (8 C. J. 802, 803), it does not follow that a defendant who has sustained detriment by the wrongful or negligent acts of the plaintiff in the disposition of such collateral is precluded from setting this up by way of counterclaim or set-off in an action on the note. The legal effect of the note, and the defendant's liability thereon, remain unchanged. These are not altered because the plaintiff has breached the obligation which it owed to the defendant with respect to the collateral security. "There is no such thing as setting up one right of action in bar of another right of action." *Taggard v. Curtenius*, 15 Wend. 155. But, as already stated, the defendant does not seek to set up plaintiff's breach of obligation as a defense to the note, but asks that the damages he has sustained by reason of plaintiff's negligent or wrongful acts be offset against the amount due on the note. Defendant's counterclaim or set-off is not an ingredient of, and in no manner affects the contract evidenced by, the note, whereby Westby agreed to pay the plaintiff a certain sum. Such counterclaim is predicated upon plaintiff's breach of the contract relating to the collateral held by it. Plaintiff did not preserve such collateral. And it is conceded that it is unable to deliver it to the defendant upon the payment by him of the note involved in this action. It seems clear that the plaintiff has breached the obligation which it owed to the defendant with respect to the collateral, and that for such breach of duty the defendant is entitled to recover the detriment which he has suffered; *viz.*, the value of the collateral. See *Ambler v. Ames*, 1 App. D. C. 191, 196; *Taggard v. Curtenius*, *supra*; 22 Am. & Eng. Enc. Law, 899. See also *Sykes v. Everett*, 167 N. C. 600, 4 A.L.R. 751, 83 S. E. 585; *Potter v. Tyler*, 2 Met. 58, 63. This being so, there is

no reason why the defendant may not counterclaim or set off the damages which he has sustained in the action on the note. *Emerson-Brantingham Co. v. Brennan*, 35 N. D. 94, 159 N. W. 710.

I agree with Mr. Justice Grace with regard to the presumptive value of bank stock. And while it is true the evidence in this case shows that the bank involved in this action had been in financial trouble, it also shows that the orders of the examiner had been complied with, and it must be assumed that any impairment had thereby been made good.

In my opinion the evidence does not justify plaintiff's claim that the defendant either consented to or ratified plaintiff's disposition of the collateral. Nor can it be said that the defendant has waived, or is estopped from asserting, his counterclaim.

BRUCE, Ch. J. I concur in the above opinion by Mr. Justice CHRISTIANSON.

BIRDZELL, J. (concurring specially). I concur in the reversal of the judgment and in the order remanding the cause for the purpose of determining the damage sustained by the defendant caused by the surrender of and failure to regain the bank stock which was held by the plaintiff as collateral to the note in suit. I can see no occasion, however, for construing any section of the Negotiable Instruments Law in deciding this case. The only question arises upon the counterclaim, and the counterclaim is based upon the right of a surety to recover damages where the creditor has allowed securities available to him to become dissipated. So far as I can discover from a careful reading of the Negotiable Instruments Law, it contains no provision which could possibly have any bearing upon the right of the defendant to counterclaim his damages unless it be the provision § 7080 of the Compiled Laws of 1913, which provides that "in any case not provided for in this chapter, the rules of the law merchant shall govern." The right of a surety to be compensated for damages in such cases as the one at bar is so well established in both the common law and the law merchant that authorities need not be cited in support of the proposition.

In my judgment there is no occasion here to refer to the doctrine

of *First Nat. Bank v. Meyer*, 30 N. D. 388, 152 N. W. 657, nor to express any opinion concerning the correctness of that decision. In that case there is much discussion as to the effect of an agreement between the principal debtor and the creditor extending the time of payment without the consent of the surety and without a reservation of the rights against the surety. It appears that the counsel for the respective parties considered that the case was controlled by certain sections of the Negotiable Instrument Law, and that the case was decided upon the theory presented and argued. Reference to the facts in that case, however, will disclose that there was no agreement between the principal debtor and the creditor extending the time of payment. On the contrary, the defendant surety predicated his damages wholly upon the claim that a judgment in the plaintiff's favor against a garnishee had been compromised to his detriment.

Notwithstanding the degree of similarity between the facts in the Meyer Case, *supra*, and the case at bar, it seems to me to be clear, as it is to the majority of the court, that this case does not involve the effect of an agreement between a creditor and a principal debtor extending the time of payment. Nor does it involve any proposition analogous to that. Inasmuch as the counterclaim does not rest upon any right which is either defined or qualified by the provisions of the Negotiable Instrument Law, I can, as indicated above, see no occasion for referring to previous constructions of the various sections of the law. It is for this reason that I express no opinion upon one of the propositions discussed in the opinion of Judge Grace, and which is further discussed, with contrary conclusions, in the opinion of Judge Christianson. I concur in the result because of the inexcusable failure of the plaintiff bank to realize upon the security which, as between it and the defendant surety, it was bound to apply to the payment of the obligation. The defendant's damages are properly measured by the value of the stock at the time the bank should have asserted its claim thereto as against Eric Stafne.

ROBINSON, J. (dissenting). Defendant Simon Westby appeals from a judgment against him on a promissory note. The defense is a counterclaim based on an alleged conversion of twenty shares of bank stock

which was collateral security. Hence, the burden of proof is on the defendant.

On November 20, 1914, defendant for value received made to plaintiff a promissory note for \$2,320.64, with interest at 8 per cent. There is no claim that the note has been paid. It was given in renewal of a debt secured by prior notes. The debt was secured by twenty shares of stock in the Citizens National Bank of Alexander, North Dakota, which stock was in the name of A. J. Stafne. As the trial court found the bank of Alexander became insolvent, went into the hands of the bank examiner, who demanded that A. J. Stafne transfer said twenty shares of capital stock to his father, Eric Stafne. Accordingly, on November 28, 1913, at Williston, with the assent or at the request of Simon Westby, the plaintiff delivered said twenty shares of stock to A. J. Stafne. He was then the vice president of the Williston State Bank and defendant was the president. The stock was delivered to Stafne that he might take the same to the Bank of Alexander, as reorganized for renewal, replace the same by renewal stock. But Stafne failed to return to the plaintiff bank any renewal stock, and thus it was left without the collateral, which was really worthless; and, with full knowledge of the facts, the defendant made the said renewal note in suit, on which the plaintiff has never received a penny. That is all there is of the case.

The findings and the judgment are clearly right, and it should be affirmed.

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R. H. PRATT and George A. Pratt, Copartners as Pratt Brothers,  
Respondents, v. HUBER MANUFACTURING COMPANY, a  
Corporation, Appellant.

(171 N. W. 246.)

**Appeal and error — new trial — presumption.**

1. Under the provisions of § 8 of chapter 31 of the Laws of 1913, it will be presumed on appeal that a new trial was not granted on account of the insufficiency of evidence to support the verdict, unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in a memorandum prepared by the trial judge.

**Fraud — sufficiency of complaint.**

2. Complaint examined and *held* to state an action for actual fraud and deceit.

**Fraud — mistake of fact.**

3. A mistake of fact cannot be proved under an allegation of actual fraud.

**Allegation of fraud — constructive fraud.**

4. Constructive fraud cannot be proved under an allegation of actual fraud.

**Special verdict — findings by jury.**

5. Special verdict of the jury examined and its findings held not to be inconsistent.

**New trial — setting aside judgment — grounds for — findings.**

6. Where a complaint is for actual fraud and the special findings negative such fraud, and the findings otherwise sufficiently cover the issues of the case, it is error to set aside a judgment rendered on such findings and to order a new trial.

Opinion filed November 4, 1918.

**Action for fraud and deceit.**

Appeal from the District Court of Griggs County, Honorable *J. A. Coffey*, Judge.

Judgment for defendant set aside and a new trial ordered.

Reversed.

**Statement of facts by BRUCE, Ch. J.**

This is an appeal from an order of the district court setting aside a special verdict and the judgment entered thereon and ordering a new trial.

The complaint alleges the sale to the plaintiffs of a gasoline tractor engine, and "that the defendant at the time of making said sale represented to the plaintiffs that the tractor they were selling them was a *new, up-to-date*, and complete tractor, and that plaintiffs purchased same relying on said representations, that said machinery was new, complete and perfect, and that the machinery was capable of doing well the work for which it was manufactured, and that it was with reasonable care durable and capable at all times of performing the work, which representation was falsely and fraudulently made for the

purpose of deceiving these plaintiffs and inducing them to purchase said machinery.

"That said tractor so delivered by the defendant to these plaintiffs was not new, was not complete, and was not up-to-date; that it was old, the parts worn, decayed, and damaged, and that in the condition said tractor was in it was wholly unfit to do the work for which it was intended; its parts, being old and decayed, were continually breaking; that it would not develop the power represented and warranted to develop, and that *it was in no particular, the machinery represented and warranted to the plaintiffs and which the defendant represented to plaintiff it was delivered*; that said tractor was an old, worn tractor, but that for the purpose of deceiving and defrauding these plaintiffs said tractor had been repainted and was so covered with paint that an examination by these plaintiffs did not reveal to them the fact that it was an old and a worn tractor, and that during all of the years 1914 and 1915 and *while these plaintiffs were working with and attempting to operate said tractor to put same in condition so that it would perform the work for which it was purchased, the defendant continued to represent and inform plaintiffs that said tractor was a new machine*, that it was up-to-date, and that it could be made to comply with the conditions of the warranty upon which it was sold, and that these plaintiffs relying upon said representations and statements continued to attempt the operation and working of said tractor, and continually bought from the defendant extras and extra parts for said tractor, and hired workmen for the purpose of having said parts put on said machinery and for the purpose of having same repaired, and that if plaintiffs had not been deceived by the statements, warranties, and guaranty of the defendant they would not have attempted to operate said machinery, but that they did not know of said false and fraudulent representations until the spring of 1916, when they then learned that said tractor was an old worn tractor, the parts badly decayed and destroyed, and that it had been repainted and that thereby plaintiffs had been misled.

"That if said tractor had been as represented and warranted, and had it been a new up-to-date, perfect machine, it would have been worth the sum of three thousand two hundred fifty dollars (\$3,250), the agreed purchase price thereof, but in the condition in which said



machinery is and was it was of no worth or greater value than the sum of two hundred fifty dollars (\$250).

"That in attempting to operate said machinery and in their attempt to make said machinery perform the work for which it was sold and for which it was intended, plaintiffs have expended the sum of three hundred eighty and 50-100 (\$380 50) dollars; that one hundred thirty-two and 50-100 (\$132.50) dollars of said amount has been paid to the defendant for extra parts; that eighty dollars (\$80) has been paid to Ludwig Rudd, a blacksmith, for his work and labor on said machinery, and that one hundred sixty-eight (\$168) dollars of said amount has been the services of George A. Pratt for himself and team for twenty days at the value of eight (\$8) dollars per day, one hundred sixty dollars (\$160) and one extra man for four days at two dollars per day, eight dollars (\$8), making one hundred sixty-eight (\$168) dollars, and making a total of three hundred eighty and 50-100 (\$380.50) dollars.

"That the representations, warranties, and statements so made by the defendant to plaintiffs during all of said time were so fraudulently made by the said defendant for the purpose of misleading and deceiving these plaintiffs and inducing them to purchase and accept said machinery and to continue their attempts to use same, and that the plaintiffs relied upon said warranties, representations, and statements, and purchased said machinery and continued to attempt the use of it, and were thereby damaged in the sum of three thousand three hundred eighty and 50-100 (\$3,380.50) dollars.

"That the defendant has sold said notes and sold them before maturity to the First National Bank of Cooperstown, and that plaintiffs have been compelled to settle for said notes to said bank.

"Wherefore, plaintiffs demand judgment against defendant for the sum of three thousand three hundred eighty and 50-100 dollars (\$3,380.50) with eight (8) per cent interest on the sum of three thousand dollars (\$3,000) from the 13th day of October, 1916, and interest on the sum of three hundred eighty and 50-100 (\$380.50) dollars from and after the 1st day of January, 1916, besides the costs and disbursements of this action."

The answer is a qualified general denial. It admits the purchase of the machine, but alleges that it was purchased subject to a written

warranty, requiring notice to be given within six days of any defect and providing that:

*"Failure to pay for the tractor at the time and place of delivery, and in the manner above provided; or a failure to give any of the notices in writing as provided for herein; or failure to render friendly assistance and co-operation; or keeping the tractor after the six days allowed as above provided; or any abuse, misuse, unnecessary exposure, or waste committed or suffered by the purchaser, shall be a waiver of the warranty and full release of the warrantor, without in any way affecting the liability of the purchaser for the price of the tractor or notes given therefor.*

"It is agreed that the use of the tractor by the purchaser after the six days shall be construed as a complete fulfilment of this warranty. Any assistant sent to the purchaser by the company after said six days shall be the agent solely of the purchaser, who shall pay all expenses incident thereto, on demand.

"All agreements appertaining to this order (excepting the mere acceptance thereof at the home office) are included in the above."

"No agent or other person shall make any different warranty or vary or modify any of the terms or waive any of the conditions of this answer. . . . All the conditions of the sale must appear on the written order, as no verbal agreements of whatever nature will be recognized or allowed."

It further alleges:

"That said machinery was purchased by the plaintiffs (as a used or second-hand machine) and was thoroughly examined by said plaintiffs before purchasing the same; and that the quality, value, and condition thereof was fully disclosed to plaintiffs by defendant, and was subject to the inspection of plaintiffs before its purchase thereof.

"That said engine was not sold by the defendant as a new machine, and that the representations, statements, conversations, and dealings between the plaintiffs and defendant were merged in the written contract of sale; and that no other or different agreements, representations, warranties, or contracts were made between the plaintiffs and the defendant, than that hereinbefore set forth and described herein.

"That defendant has complied with the terms and conditions of said contract on its part to be performed, but that the plaintiffs have wholly

failed, neglected, or refused to comply with the terms and conditions on their part to be performed under the terms of said contract.

"That among other things the plaintiffs did not give the notice of the alleged defective condition of said machinery within the time or in the manner required by said contract and warranty, or at all, and did not give such notice to said defendant at its home office, stating what parts or wherein said machinery was defective, or did not comply with the contract and warranty, and did not give the defendant a reasonable time in which to examine said machinery, and to ascertain the condition thereof and the extent to which the same was not in the condition represented by said contract. That the said plaintiffs did not return the part or parts of the machinery claimed to be defective, or not as represented by the defendant to the plaintiffs, where received, and did not give the defendant the option to either furnish another tractor, or a new part for that claimed or found to be defective, or return the money and notes and other property given for the purchase price thereof, or the value of the same, and thereby rescind the contract in whole or in part, and be hereby released from any further liability.

"That if any metallic piece on said machinery broke during the first season, by reason of a flaw therein, the defendant furnished a new piece in its place, free on board the cars at its factory, upon such broken piece being returned to the factory promptly, and it appearing thereby to the satisfaction of the defendant that the break was caused by the flaw.

"That the said plaintiffs, after purchasing and taking possession of said engine, have retained the possession thereof, and now have possession of said property. That said plaintiffs have used said machinery for a period of more than two years for their own benefit and advantage.

"That said plaintiffs waived and condoned any alleged fraud by their acceptance of the contract and their performance thereof, and by their retention and use of said machinery for a period of more than two years and long after the said plaintiffs were *fully advised of the facts upon* which said plaintiffs now base their claim for fraud, as set forth in the complaint.

"That during the time that the said plaintiffs have used and re-

tained said machinery, they have permitted the same to be abused, misused, and exposed to the elements, and have by their own affirmative disposition of said property made it impossible to place the parties *in status quo* or rescind the agreement on account of any alleged fraud. That by reason of the failure of said plaintiffs to comply with said contract and warranty, and by reason of the failure of said plaintiffs to give any of the notices in writing, as provided in said contract, and by reason of the failure of said plaintiffs to render friendly assistance and co-operation in connection with remedying defects in said machinery, and by reason of the retention of said machinery after the six days allowed in said contract, and by reason of the abuse, misuse, and unnecessary exposure and waste of said property committed and suffered by said plaintiffs, there has been a complete waiver and release of said defendant from any liability on account of the purchase of said machinery. That under the terms and conditions of the contract and purchase and sale of said machinery, the remedy of said plaintiffs was *limited to rescission, and any and all claims for damages* brought by said plaintiffs, as set forth in the complaint, or otherwise, are barred, and said plaintiffs are limited to the exclusive remedy of rescission agreed upon in the contract made at the time of the purchase of said machinery by said plaintiffs."

The special verdict is as follows:

Q. 1. Were the plaintiffs, R. H. Pratt and George A. Pratt, at all times mentioned in the complaint, and are they now copartners, and is the defendant a foreign corporation?

A. 1. Yes. (Answer inserted by stipulation).

Q. 2. Did the plaintiffs and the defendant on the 13th day of October, 1913, enter into a written agreement, exhibit A, for the purchase by the plaintiffs and sale and delivery by the defendant of a 30 by 60 cap cylinder, traction, gasoline engine?

A. 2. Yes. (Answer inserted by stipulation.)

Q. 3. Did the defendant on the 20th day of October, 1913, deliver to the plaintiff a 30 by 60, cap cylinder, traction gasoline engine, and did the plaintiffs at the same time settle for the machinery by executing and delivery of the notes described in exhibit A, and by delivering the universal gas tractor as described in exhibit A, and pay the

freight on said engine from Fargo to Cooperstown in the amount of \$110?

A. 3. Yes. (Answer inserted by stipulation.)

Q. 4. What was the actual money value of the notes and gasolene tractor engine delivered by the plaintiffs to the defendant in settlement of the 30 by 60 cap cylinder gas traction engine delivered to the plaintiffs by the defendant on October 20, 1913?

A. 4. \$3,250.

Q. 5. Was the 30 by 60 cap cylinder traction gasolene engine so sold and agreed to be delivered by the defendant to the plaintiffs to be a new and unused tractor?

A. 5. Yes.

Q. 6. If you answer question No. 5, "Yes," then did the defendant at the time of the making of the contract exhibit A falsely and fraudulently, and with intent to deceive and defraud the plaintiffs, represent to the plaintiffs that it was selling them a new and unused 30 by 60 cap cylinder gasolene tractor engine?

A. 6. No.

Q. 7. Now, if you answer question No. 6, "Yes," then did the plaintiffs rely upon such representations and were they deceived thereby and thereby induced to purchase said tractor and were they thereby damaged?

A. 7. No.

Q. 8. Was the 30 by 60 cap cylinder gasolene tractor delivered by the defendant to the plaintiffs on the 20th day of October, 1913, a new and unused tractor engine?

Q. 9. If you answer question 8, "No," then did the defendant knowingly and with fraudulent intent to cheat, wrong, and defraud plaintiffs, deliver to the plaintiffs a second-hand, overhauled, and repainted gasolene tractor engine?

A. 9. No.

Q. 10. If you answer question No. 9, "Yes," then did plaintiffs know at the time the tractor was delivered to them that it was not a new, unused tractor, and that it was a second-hand overhauled, and repainted tractor?

A. 10. . . .

Q. 11. What was the value of the tractor delivered by the defendant to plaintiffs on the 20th day of October, 1913, at the time of delivery and in the condition it then was?

A. 11. \$3,250.

Q. 12. Did George A. Pratt on the 15th day of September, 1914, at the time when he signed exhibit 1, believe that the 30 by 60 cap cylinder gasoline tractor engine delivered to the plaintiffs by the defendant was a new and unused machine at the time of purchase?

A. 12. Yes.

Q. 13. Have the plaintiffs paid the agreed purchase price for said tractor delivered on October 20, 1913?

A. 13. Yes.

Q. 14. What amount of expenses have plaintiffs paid in their attempts to make said tractor so delivered to them on the 20th day of October, 1913, work, said expenses to include extras bought from the defendants, blacksmith bills, and cash paid in expenses for trips in connection with said work?

A. 14. \$179. (Answer inserted by stipulation.)

Q. 15. Did George A. Pratt on the 15th day of September, 1914, when he signed exhibit 1, know that the 30 by 60 cap cylinder gasoline tractor delivered to the plaintiffs by the defendant on the 20th day of October, 1913, was not a new, unused tractor, but was a second-hand, overhauled, repainted, and used tractor?

A. 15. No.

Q. 16. Did the plaintiffs examine and inspect the machinery described in exhibit A, at Fargo, North Dakota, prior to the time of the 97 execution and delivery of said exhibit A?

A. 16. Yes.

Q. 17. If you answer the last question, "Yes," then was the gas tractor engine delivered by the defendant to the plaintiffs on October 20, 1913, the same engine as that inspected and examined by the plaintiffs prior to the execution of exhibit A?

A. 17. Yes.

Q. 18. Did the plaintiffs sign exhibit 1?

A. 18. Yes. (Answer inserted by stipulation.)

Q. 19. Did the plaintiffs at the time of the signing of exhibit 1 pay to the defendant the sum of \$72.50; and did the defendant furnish

to the plaintiffs the repairs listed in said exhibit 1 and send Mr. Carlson to put that repairs on the engine as therein described?

A. 19. Yes. (Answer inserted by stipulation.)

Q. 20. Was the gasoline traction engine described in exhibit A the same engine as is described in exhibit 1?

A. 20. Yes. (Answer inserted by stipulation.)

*Lawrence & Murphy*, for appellant.

The common law requires that the parties should form an issue of their pleadings before the case can be decided by a jury.

The trial is the examination of the facts in issue. 3 Bl. Com. 330; *Deane v. Williamette Bridge Co.* 29 Pac. 440; *Jones v. Baird*, 76 Ind. 164; *Ft. Scott R. Co. v. Karracher*, 46 Kan. 611, 26 Pac. 1027.

Findings must be responsive to the issues made by the pleadings, and portions thereof which are not may be stricken out. 38 Cyc. 1925, and note.

Where the facts properly found are sufficient to sustain the special verdict, it is not rendered insufficient because another special finding consists merely of a conclusion of law or of an immaterial fact not in issue. *Pittsburg R. Co. v. Burton*, 159 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Louisville R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3.

A special verdict should be construed fairly and reasonable, disregarding subtle and refined distinction or intendment and inference. *Becknell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580; *Keller v. Gaskill*, 20 Ind. App. 502, 50 N. E. 363; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Ellwood v. Carpenter*, 12 Ind. App. 459, 40 N. E. 548; *Sirk v. Marion St. R. Co.* 11 Ind. App. 680, 39 N. E. 421; *Brason v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Woodward v. Davis*, 127 Ind. 172, 26 N. E. 687; *Pullman Palace Car Co. v. Gaylord*, 9 Ky. L. Rep. 58; *Mayo v. Keston*, 78 Ga. 125, 2 S. E. 687; *Cobb v. Wise*, 71 Ga. 103; *Voris v. Star City Bldg. etc. L. Asso.* 20 Ind. App. 630, 50 N. E. 779; *Tate v. Missouri R. Co.* 143 Ill. App. 289; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Fenn v. Blanchard*, 2 Yeates, 543; *Louisville, N. A. etc. R. Co. v. Lynch*, 147 Ind. 165, 34 L.R.A. 293, 44 N. E. 997, 46 N. E. 471; *Fenske v. Nelson*, 74 Minn. 1, 76 N. W. 785; *Everit v. Walworth County Bank*, 13 Wis. 420.

A special verdict should be liberally construed, so that it will stand rather than fall; and if it expresses the findings of the jury upon the issues and facts, its form is immaterial. *Everit v. Walworth County Bank*, *supra*; *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618; *Pullman Palace Car Co. v. Gaylord*, *supra*; *Miller v. Shackelford*, 4 Dana, 274; *Voris v. Star City Bldg. & L. Asso.* *supra*; *Louisville, N. A. etc. R. Co. v. Costello*, 9 Ind. App. 462, 36 N. E. 299.

An improper interrogatory and answer in a special verdict are immaterial where the verdict is sufficient regardless of them. *Pittsburg R. Co. v. Back*, 152 Ind. 421; *Shippo v. Atkinson*, 36 N. E. 375.

If any fact essential to support the complaint is not found plaintiff must fail. *Shippo v. Atkinson*, *supra*.

Fraud without damage or damage without fraud is not actionable. Both must concur in action for deceit. *Enistein v. Marshall*, 58 Ala. 153, 25 Am. Rep. 729; *Kuentze v. Kennedy*, 29 L.R.A. 360, 147 N. W. 124; *Childs v. Merrill*, 63 Vt. 463, 14 L.R.A. 264, 22 Atl. 626; *Nelson v. Grondahl*, 12 N. D. 130; *London & L. Fire Ins. Co. v. Liebes*, 105 Cal. 203, 38 Pac. 691; *March v. Cook*, 32 N. J. Eq. 262; *Bartlett v. Blaine*, 83 Ill. 25, 25 Am. Rep. 346; *Danforth v. Cushing*, 77 Me. 182; *Hale v. Philbrick*, 47 Iowa, 217; *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628; *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; *Bigelow, Fraud*, p. 541; 14 N. D. 248; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 431; *Eastwood v. Bain*, 3 Hurlst. & N. 738; *Hemingway v. Hamilton*, 4 Mees. & W. 115.

There must only be a false representation made with intent to deceive, but the representation must be relied upon and cause damage to a party before an action will lie. *Barber v. Kilbourn*, 16 Wis. 485; *Castleman v. Griffin*, 13 Wis. 535; *Freeman v. Venner*, 120 Mass. 424; *Ide v. Gray*, 11 Vt. 615; *Randall v. Haselton*, 12 Allen, 412; *Fuller v. Hogdon*, 25 Me. 243; *Alden v. Wright*, 47 Minn. 225, 40 N. E. 767; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Morrison v. Lods*, 39 Cal. 381; *Purdy v. Bullard*, 41 Cal. 444; *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. 12; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; *Smith v. Richards*, 13 Pet. 26, 10 L. ed. 42; *Wainscott v. Occidental, etc. Asso.* 98 Cal. 253, 33 Pac. 88; *Huffman v. Long* (Minn.) 42 N. W. 355; *Johnson v. Seymour* (Mich.)



44 N. W. 344; *Armstrong v. Breen* (Iowa) 69 N. W. 1125; *Beare v. Bliley* (Colo.) 34 Pac. 271; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299; *Sonnesyn v. Akin & Babcock*, 14 N. D. 256.

*H. R. Turner* and *Barnett & Richardson*, for respondents.

Regardless of the general rule, the practice in North Dakota is to attack the inconsistency and insufficiency of a special verdict by a motion for a new trial. *Beare v. Wright*, 14 N. D. 26; *Sonnesyn v. Akin*, 14 N. D. 248; *Johnson v. Glaspey*, 16 N. D. 335; *Ward v. Gradin* (N. D.) 109 N. W. 57; *Lathrop v. St. R. Co.* 23 N. D. 246.

When the different parts of a special verdict are inconsistent and in conflict with each other, the verdict must be set aside. 24 L.R.A. (N. S.) 50, note 3; *Lathrop v. Street R. Co.* 23 N. D. 255.

In entering judgment the court can look only to the special verdict for the determination of the facts in issue. The evidence cannot take the place of findings. *Ward v. Gradin* (N. D.) 109 N. W. p. 60; *McBride v. R. R. Co.* (Wyo.) 21 Pac. 687; *Lathrop v. St. R. R. Co.* *supra*.

The question of value when material should not be proven by offers made or prices asked. *Jones Ev.* § 169; 16 Cyc. 1141 (4); 1142 (B).

BRUCE, Ch. J. It is clear that the question of the insufficiency of the evidence to support the findings of the jury cannot be raised upon this appeal. Since § 8 of chapter 131 of the Laws of 1913 provides that: "With all orders granting or refusing a new trial, the judge shall file a written memorandum concisely stating the different grounds on which his ruling is based, and *unless insufficiency or unsatisfactory nature of the evidence is expressly stated in such memorandum, as a reason for granting the new trial, it shall be presumed on appeal that it was not on that ground.*"

No such memorandum was filed in the case at bar, and we must assume, therefore, that the new trial was granted either because he deemed the findings to be inconsistent, or that the special verdict established that the plaintiffs suffered no damage by reason of the alleged fraud, or found no such fraud or the amount of any injury.

It is clear to us that the complaint states an action for actual fraud and deceit, and that the case was tried upon this theory and this theory alone.

The gist of the action is actual fraud, and such the special verdict does not find. It does not even find a mutual mistake. It finds that the parties entered into an agreement for the sale and delivery by the defendant of a 30 by 60 cap cylinder traction gasoline engine; that the defendant on the 20th day of October, 1913, delivered to the plaintiff a 30 by 60 cap cylinder traction gasoline engine; that the 30 by 60 cap cylinder traction gasoline engine so sold and agreed to be delivered by defendant to the plaintiffs was to be a new and unused tractor; that the gasoline tractor so delivered was not a new and unused tractor engine; that the defendant did not falsely and fraudulently, and without intent to deceive and defraud the plaintiffs, represent to the plaintiffs that it was selling them a new and unused engine; nor did it knowingly intend to cheat, wrong, and defraud the plaintiff by delivering to the plaintiff a second-hand, overhauled, repainted gasoline engine. It also found in answer to two interrogatories that the engine delivered to the plaintiff was worth \$3,250, the purchase price paid therefor. So far there is no finding of actual fraud. There is, however, a finding that at the time of the purchase the plaintiffs believed that the engine delivered to them was a new and unused machine, and, although they examined the machine, they did not know at the time of the purchase or delivery that it was not a new, unused tractor; and, as we have construed the answer, it is admitted that the tractor was not new, and that the defendant was aware of the fact at the time. Though, therefore, the complaint charges actual fraud, we find that the same is negatived by the findings, and though there is a finding of a mistake on the part of the purchaser of the machine (which the proof says he examined before it was delivered by the defendant, but that he believed to be a new and unused machine), there is no finding of a mistake on the part of the seller. We have, therefore, a case where a manufacturer agrees to sell an unused machine, but without fraud or intent to deceive, delivers a used one, and we fail to see why any such findings are inconsistent, as it is clear that such a delivery might clearly be made on the assumption that the second-hand machine was as good as a new one, or that, though a new machine had first been spoken of, the purchaser had examined the sample old one and was satisfied therewith. At the most we have a case where a person has contracted to buy a new machine and receives an old one. There is a mistake of fact on the part of the

purchaser but not on the part of the seller. Even if there were a mutual mistake of fact it is clear that such cause of action was not outlined by the complaint and cannot be relied upon. *Connell v. El Paso Gold Min. & Mill. Co.* 33 Colo. 30, 78 Pac. 677; *Camp v. Carithers*, 6 Ga. App. 608, 65 S. E. 583.

The facts present at the most a breach of a contract and in which the remedy of rescission has not been relied upon. Even, if they disclose a constructive fraud and come within the definition of § 5850 of the Compiled Laws of 1913, and if, as found by verdict, the defendants agreed to deliver to the plaintiff a new machine, and it was their duty to furnish the same, and the defendants were therefore guilty of a breach of duty for which they would be responsible, still constructive fraud cannot be proved under an allegation of actual fraud, nor can one recover upon a concealment where he has alleged an actual fraud. *Haynes v. McKee*, 19 Misc. 511, 43 N. Y. Supp. 1126; *Markham v. Emerson*, 69 Mo. App. 292; *Biard v. Tyler Bldg. & L. Asso.* — Tex. Civ. App. —, 147 S. W. 1168; *American Surety Co. v. Pacific Surety Co.* 81 Conn. 252, 19 L.R.A.(N.S.) 83, 70 Atl. 584. We are satisfied, therefore, that the trial court correctly entered judgment for defendant in the first instance, and that there was no justification for granting a new trial in the premises. We realize that where the findings are inconsistent a new trial may be granted, but there is nothing in the findings that is inconsistent. Actual fraud, as we have before said, is charged. Findings 6, 7, and 9 absolutely disprove that charge. There is nothing in the other findings that is inconsistent with those mentioned, and findings 17 and 20 seem to support them.

Nor do we believe that the judgment should be set aside on the ground that all questions were not fully presented or material issues were not fully presented, as the findings cover both the questions of fraud, both at the time and the making of the contract and at the time of the delivery of the engine.

The order of the District Court is reversed and the judgment which was formerly entered is ordered to be reinstated.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). In October, 1913, for the sum of \$3,250 defendant agreed to sell the plaintiff a new and unused 30x60 gasolene

tractor with fixtures and equipment, and, in lieu of a new and unused engine, defendant delivered to the plaintiff an old second-hand and repainted engine which was of much less value. The plaintiff received and used the engine not knowing that it was an old repainted and second-hand engine, and he paid for the same in cash or notes at the price of a new engine. The jury found a special verdict most favorable to defendant. The court made an order granting a new trial and defendant appeals.

The motion for a new trial was made on these grounds:

1. Insufficiency of the evidence.
2. That the special verdict is insufficient and contradictory.

In the opinion as written by the chief justice it is said: The insufficiency of the evidence cannot be raised upon this appeal because the trial court has failed to make a memorandum showing that the order was based on the insufficiency of the evidence. Now, it often happens that in deciding a motion a judge fails to make and file any memorandum of his reasons. But surely the rights of the parties to a suit are not concluded by any such failure of the judge, and the counsel has no means of compelling a judge to give his reasons for any decision.

An order granting a new trial is to some extent discretionary, and it should not be reversed unless it appears to be wrong. Then it is said: The gist of the action is actual fraud, but that is not strictly true. *The gist of the action is a failure of the defendant to comply with its contract.* It is conceded that for \$3,250 defendant agreed to deliver to plaintiff a new and unused engine, and, in lieu of the new engine, it delivered an old second-hand engine, repainted to look like new. And, of course, no old second-hand engine is equal to a new engine. In a suit to recover actual damages, the question is the difference between a new engine and an old engine, and the question of actual fraud is wholly immaterial. *The damage is the difference between the value of a new engine and the value of the old engine delivered to the plaintiffs.* Comp. Laws, § 7158. There being no claim for exemplary damages, the question of fraud is wholly immaterial. The special verdict is that the plaintiff bargained for a new engine and he got an old, repainted engine which he believed to be a new engine. It is true the jury say that the repainted engine was as good as new, but that is manifestly untrue. When a gasoline engine has been used so

that it has to be repainted to look like new, it is never as good as new. And the evidence demonstrates to a certainty that the old engine was very far from being as good as new. Indeed, it was almost worn out.

Defendant talks of its peculiar warranty which is a fraud on its face. No person except an expert machinist could ever comply with such a warranty. But that is of no consequence on this appeal. Defendant contracted for a new engine and an old one was palmed off onto him. It was done by design, by accident, or mistake. The motive is wholly immaterial. The order granting a new trial was clearly right and it should be affirmed.

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JOHN V. BOULGER and Edward J. Hughes, Respondents, v.  
NORTHERN PACIFIC RAILWAY, Appellant.

THOMAS E. VALLANCY, Respondent, v. NORTHERN PACIFIC  
RAILWAY, Appellant.

HARRIET WEIR, Respondent, v. NORTHERN PACIFIC RAIL-  
WAY, Appellant.

AUGUST ZIESMER, Respondent, v. NORTHERN PACIFIC  
RAILWAY, Appellant.

(171 N. W. 632.)

**Trial — special verdict — effect.**

1. The failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact, and this whether the party be the plaintiff or the defendant.

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**NOTE.**—That a railroad company is liable to property owners along its road for injuries caused by its obstruction of water that flows in a natural course, and the reasonableness of the obstruction is not material, will be seen by an examination of notes in 22 L.R.A.(N.S.) 789, and L.R.A.1917A, 517, on right of owner of lower tenement as against the rights of the upper landowner to obstruct surface water in a natural drainage channel.

**Torts — damages — recovery from one partially liable.**

2. Where it appears that part of the damage in a tort action was caused by a third party or a third cause, the plaintiff, unless a conspiracy or a joint tort can be proved, can only recover against the defendant such damages as he can show were occasioned by defendant's wrong.

**Trial — special verdict — recovery.**

3. Where the special verdict of a jury finds that the injury to plaintiff's property, which was flooded by surface waters, was, if due at all, to the obstructing of such waters by the defendant's railroad embankment and the flooding back therefrom, and was also due to the waters rushing down hill and running into the basements before they even reached such track, and does not determine how much damage was occasioned by each of the causes, no recovery against the defendant can be had on such a verdict.

**Watercourses — surface water — action — special verdict.**

4. Special verdicts of the jury examined and found not to be inconsistent.

**Appeal and error — special verdict — judgment — appealable order.**

5. Where a special verdict is submitted to the jury, which covers all of the material issues of the case, and such findings are in favor of the defendant, such defendant is entitled to the reception of the same and judgment thereon, and an order overruling a motion for such judgment and followed by an order for a new trial is an appealable order and comes within the provisions of § 7841 of the Compiled Laws of 1913, which makes orders appealable which effect a substantial right, when such order in effect determines the cause and prevents a judgment from which an appeal might be taken.

Opinion filed November 16, 1918.

Actions to recover for injuries occasioned by the flooding of plaintiff's premises.

Appeal from the District Court of Stark County, Honorable W. C. Crawford, Judge.

Motion for judgment on special verdicts denied and new trials ordered.

Defendant appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

These are actions for damages occasioned by the flooding of the plaintiffs' premises by water alleged to have been obstructed by the defendants' railroad embankment, and during the same storm as that

which was considered in the cases of *Soules v. Northern P. R. Co.* 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823, and *Reichert v. Northern P. R. Co.* 39 N. D. 115, 167 N. W. 127.

Special verdicts were requested, and the following questions were propounded and answered:

We, the jury impaneled and sworn to try the above-entitled action, do make the following answers to the questions submitted to us:

1. Q. Does the railroad embankment cross a natural channel for drainage of surface waters where the railroad culvert is constructed?

1. A. It does.

2. Q. Was the 4-foot culvert maintained by the defendant, if not obstructed by any floating street culvert crossing or other *débris*, of sufficient size and capacity to take care of storm waters which might reasonably be expected in this locality?

2. A. (Not answered.)

3. Q. If you answer question No. 2, "No," should an ordinarily prudent man in the exercise of ordinary and usual care have known that said culvert was not sufficient in size or capacity?

3. A. No.

4. Q. Would an ordinarily prudent person under similar circumstances have installed the 4-foot culvert in question here?

4. A. Yes.

5. Q. Did the defendant employ competent engineers to determine the size of a culvert necessary to take care of the running off from the drainage basin in question here and make installation of such culvert?

5. A. No.

6. Q. Is it just as probable that the flooding of the Masonic Temple basement and the damage to plaintiff's property was occasioned by causes other than the negligence of the defendant railway company, if you find said railway company was negligent?

6. A. No.

7. Q. Was the 4-foot culvert maintained by the defendant, if obstructed by any floating street platform or other *débris*, of sufficient size and capacity to take care of all the rain that fell on July 28, 1914, up to 6:30 o'clock on the morning of that day?

7. A. No.

8. Q. Was the running off of the waters through the culvert under the track obstructed and blocked by the street culvert crossing and other *débris* referred to in the testimony, thus causing the waters to back up and flood plaintiffs' premises?

8. A. (Not answered.)

9. Q. Was the storm and flood of July 28, 1914, an unusual and extraordinary one?

9. A. Yes.

10. Q. Was the storm of July 28, 1914, such a storm that might reasonably be expected to occur in this vicinity?

10. A. Yes.

11. Q. Should the ordinary prudent man residing in this region have anticipated from his general experience such a storm and rainfall as occurred on July 28, 1914?

11. A. Yes.

12. Q. Did plaintiffs sustain damages because of the flooding of their premises on July 28, 1914?

12. A. Yes.

13. Q. If they did sustain damages what was the amount of that damage?

13. A. Vallancy, \$700; Weir, \$1,400; Boulger & Hughes, \$2,300; Zeismer, \$600.

14. Q. Did the water coming down either Sims street or First street north from the west flow over the sidewalk and into the basement of the building occupied by Boulger & Hughes, thus damaging plaintiffs' property?

14. A. Yes.

15. Q. Did any water other than that backed up from the railway culvert run into the basement of the Masonic Temple, thus damaging plaintiffs' property?

15. A. Yes.

16. Q. Did water run into the basement of the Masonic Temple before the railway culvert under the tracks was running full?

16. A. Yes.

17. Q. If you answer question No. 16 in the affirmative about how much water had run in?

17. A. Do not know.



Motions for judgment on the special verdicts were made by both the plaintiffs and the defendant, but were denied, and the court on its own motion ordered new trials.

The defendant appeals from the orders denying its motions for judgment on the verdicts.

*Walson, Young, & Conmy*, for appellant.

In order to entitle plaintiff to have judgment on a special verdict, the jury must have answered all the questions in the special verdict in such a way so as to find all the material facts necessary to constitute plaintiffs cause of action and to eliminate the defenses to same. *Hedderick v. Hedderick*, 18 N. D. 488; *Morrison v. Stone*, 37 Pac. 142.

Where the facts stated in answer to an interrogatory are such as to preclude a recovery the court must so adjudge. *Rice v. Evansville*, 108 Ind. 7, 11, 9 N. E. 139; *Railway Co. v. Pinchin*, 112 Ind. 597, 13 N. E. 677; *Korrady v. Lake Shore & M. S. R. Co.* 29 N. E. 1071; *Dull v. Cleveland, C. C. & St. L. R. Co.* 52 N. E. 1013.

A venire de novo will not be awarded for defects and uncertainties in a special verdict unless they are such that no judgment can be rendered upon the verdict. *Salem-Bedford Stone Co. v. O'Brien*, 49 N. E. 457; *Spaulding v. Mott*, 76 N. E. 620; *Hadley v. Lake Erie R. Co.* 46 N. E. 935, 51 N. E. 337; *Smith v. Barber*, 53 N. E. 1014; *Waterberry v. Miller*, 41 N. E. 383; *Myers v. Green*, 69 Am. St. Rep. 344, 51 N. E. 942; *Hedderick v. Hedderick*, 18 N. D. 494, 123 N. W. 276; *Bush v. Maxwell (Wis.)* 48 N. W. 250; *White v. Bailey*, 14 Conn. 272; *Johnson v. Ins. Co.* 39 Mich. 33.

Where a special verdict fails to determine all the controverted material issues by the facts found, such issues as are ignored must be regarded as not sustained by the party on whom rests the burden of proof. 22 Enc. Pl. & Pr. 996; *Brazil Block Co. v. Hoodlet (Ind.)* 27 N. E. 74; *Wabash R. Co. v. Ray*, 51 N. E. 920; *Cleveland R. Co. v. Miller*, 49 N. E. 445; *Ballard v. Citizens St. Ry.* 47 N. E. 643; *Atchison, T. & S. F. R. Co. v. McCandless*, 6 Pac. 587; *Croan v. Baden*, 85 Pac. 532; *Mulvaney v. Burrows (Iowa)* 132 N. W. 873; *Dougherty v. Snyder*, 71 S. W. 463; *A. T. & S. F. R. Co. v. Johnson*, 41 Pac. 641; *Hayes v. Smith*, 15 Ohio C. C. 300; *State v. Jackson (Ind.)*

100 N. E. 479; *Reeves v. C. M. & St. P. R. Co.* (S. D.) 123 N. W. 498; *Flannery v. Ry. Co.* 23 Mo. App. 120; *Allen v. Lizer* (Kan.) 58 Pac. 238; *Missouri, K. & T. R. Co. v. Bussel*, 71 Pac. 261.

Defendants are entitled to judgment unless there be a finding showing defendants' negligence proximately caused the loss. *Maitland v. Paper Co.* (Wis.) 72 N. W. 1124; *Groth v. Thomas*, 86 N. W. 178; *Baynowski v. Lumberman Co.* 67 N. W. 1171; *Watson v. Colusa Min. Co.* 79 Pac. 15; *Newark v. Chestnut Hill Land Co.* 75 Atl. 645; *McDonough v. R. M. M. Co.* 38 N. D. 465, 165 N. W. 504; *Chybonski v. Bucyrus Co.* (Wis.) 106 N. W. 833; *Meehan v. Great Northern R. Co.* 13 N. D. 443, 101 N. W. 183; *Black v. Fair Association*, 164 N. W. 297; *Adams v. Mining Co.* 11 L.R.A.(N.S.) 845.

*T. F. Murtha and Thomas H. Pugh*, for respondents.

An order denying a motion for judgment notwithstanding the verdict is not an appealable order. To be reviewed on appeal such an order must be included in or connected with a denial of a motion for a new trial. *Turner v. Crumpton*, 25 N. D. 134; *Comp. Laws* 1913, § 7841; *Persons v. Simons*, 1 N. D. 243, 46 N. W. 969; *Hodge v. Franklin Ins. Co.* (Wis.) 126 N. W. 1098; *Ripon Hdw. Co. v. Dodge* (Wis.) 123 N. W. 659; *Watkins Med. Co. v. McCall* (Minn.) 133 N. W. 966; *Oelschlegel v. Ry.* (Minn.) 73 N. W. 631; *Hostager v. Northwestern Paper Co.* (Minn.) 124 N. W. 213.

BRUCE, Ch. J. (after stating the facts as above). Though these are actions for damages occasioned by the same flood which was involved in the prior cases of *Soules v. Northern P. R. Co.* 34 N. D. 7, L.R.A. 1917A, 501, 157 N. W. 823, and *Reichert v. Northern P. R. Co.* — N. D. —, 167 N. W. 127, the buildings which are here claimed to have been flooded were situated at a greater distance from and at a higher elevation than those which were therein injured, and it may well have been that the waters flowing back from the railway culvert or embankment would have flooded the buildings on this lower area while not those in the cases which are before us.

The cases, however, must be decided upon the law as announced in the prior case of *Reichert v. Northern P. R. Co.* supra. According to that case the material questions to be decided are: Was the waterway or drainway the natural and accustomed channel for the escape of surface waters, and did the railway company so obstruct the same

that, after such obstruction, it was unable to carry off waters, which it would have formerly carried, *and did such obstruction occasion injury to the plaintiffs?*

The rule seems to be well established that "the failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact." We do not, however, construe this rule as the defendant evidently construed it, and that is, that such failure will in all cases be construed against the plaintiff, who has, of course, the general burden of proof in all actions of negligence, but rather as against the party whether, plaintiff or defendant, upon whom the particular burden rests to establish the particular fact, and whether such fact is necessary to the plaintiffs' case or necessary merely to the defense of the defendant. See *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Cleveland, C. C. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Atchison, T. & S. F. R. Co. v. McCandliss*, 33 Kan. 366, 6 Pac. 587, 3 Am. Neg. Cas. 430; *Croan v. Baden*, 73 Kan. 364, 85 Pac. 532; *Mulvaney v. Burroughs*, 152 Iowa, 439, 132 N. W. 873; *Dougherty v. Snyder*, 97 Mo. App. 495, 71 S. W. 463; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641, 6 Am. Neg. Cas. 187; *Hayes v. Smith*, 15 Ohio C. C. 300, 8 Ohio C. D. 92; *State ex rel. Monroe County v. Jackson*, 52 Ind. App. 254, 100 N. E. 479; *Reeves v. Chicago, M. & St. P. R. Co.* 24 S. D. 84, 123 N. W. 498; *Flannery v. Kansas City St. J. & C. B. R. Co.* 23 Mo. App. 120; *Allen v. Lizer*, 9 Kan. App. 548, 58 Pac. 238.

Under this rule the special verdict found that the railroad embankment crossed a natural channel for the drainage of surface waters; that the 4-foot culvert maintained by the defendant, if unobstructed by any floating street platform or other *débris*, was not of sufficient size and capacity to take care of all of the rain that fell on July 28, 1914, up to 6:30 o'clock on that day; that the running off of the water of the culvert under the track was not obstructed or blocked by the street culvert crossing and other *débris* referred to in the testimony; that the storm of July 28, 1914, was such a storm that might reasonably be expected to occur in the vicinity; that an ordinary prudent man residing in this region should have anticipated from his general

experience such a storm and rainfall; that the plaintiffs sustained damages because of the flooding of their premises on July 28, 1914; that the amount of their damages was: Vallancy, \$700; Weir, \$400; Boulger & Hughes, \$2,300; Zeismer, \$600.

So far there is no finding that the flooding of the property of the plaintiffs was due to the water backing up from the railroad embankment or from the culvert under the same, and the only finding in relation thereto are the following questions and answers:

Q. Is it just as probable that the flooding of the Masonic Temple basement and the damages to plaintiffs' property was occasioned by causes other than the negligence of the defendant railroad company, if you find said railroad company was negligent?

A. No.

Q. This question and answer is entirely unsatisfactory, as the question is clearly double, and prior thereto there is no specific finding of negligence. Following is the specific finding:

Q. Did water coming down either Sim street or First street, north from the west, flow over the sidewalk and into the basement of the building occupied by Boulger & Hughes, thus damaging plaintiff's property?

A. Yes.

If this question and answer means anything, it means that the water on its way down from the elevation above flowed onto the plaintiffs' property, and it nowhere holds that it was a defective culvert that occasioned the damage, or that the water so flowing was backed up from the embankment.

Following it are the following questions:

Q. Did any water otherwise than that backed up from the railroad culvert run into the basements of the Masonic Temple, thus damaging plaintiff's property?

A. Yes.

Q. Did water run into the basements of the Masonic Temple before the railroad culvert under the tracks was running full?

A. Yes.

Q. If you answer number 16 in the affirmative, about how much water had run in?

A. Do not know.

One of the principal defenses of the defendant is that the flooding was not occasioned by the embankment or the 4-foot culvert, but by the water running into the basements while coming down the hills and piling up upon the street. There is no attempt in the case to show, and there is no finding, as to how much of the damage was occasioned by the waters flowing down the hills and before it reached the railroad track, and how much was occasioned by the water flooding back from the railroad track, if, in fact, any there was. And the undisputed testimony shows that there was a large amount of water in the basement before any is claimed to have come from the railroad embankment.

It is well established that where it appears that part of the damage was caused by a third party or a third cause, the plaintiff, unless a conspiracy or joint tort can be proved, can only recover against the defendant such damages as he can show were occasioned by the defendants' wrong.

As was well said in the case of *Watson v. Colusa-Parrot Min. & Smelting Co.* 31 Mont. 513, 79 Pac. 15. "The defendant's act being several when it was committed cannot be made joint because of the consequence which followed in connection with others who had done the same or a similar act." It is true that it is difficult to separate the injury, but that furnishes no reason why one tort-feasor should be liable for the act of others who have no association and who do not act in concert with him. If the law was otherwise, the one who did the least might be liable for damages of others, damage exceeding the amount for which he really was chargeable in any means to enforce contribution or to adjust the amount among the different parties. So, also, proof of an act committed by one person would entitle the plaintiff to recover for all damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a law cannot be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from others should furnish no reason for holding that one tort-feasor should be liable for acts of others with whom he is not acting in concert. See also *Newark v. Chestnut Hill Land Co.* 77 N. J. Eq. 23, 75 Atl. 645; *McDonough v. Russell-Miller Mill. Co.* 38 N. D. 465, 165 N. W. 504; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 7 L.R.A.(N.S.) 357, 106 N. W. 833;

Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Adams v. Bunker Hill & S. Min. Co. 12 Idaho, 637, 11 L.R.A.(N.S.) 845, 89 Pac. 624; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007.

We find no inconsistency in the special findings, and the respondents themselves contend that there are none. Even though finding No. 6 is somewhat confusing on account of the double nature of the question, it is well established that positive findings finding material facts, which are conclusive of the controversy, overcome those which are merely incidental. Robinson v. Washburn, 81 Wis. 404, 51 N. W. 578.

This being the case the court, rather than ordering new trials, should have granted the plaintiffs' motions for judgments upon the special findings; that is to say, if the orders appealed from were appealable at all, and this court has jurisdiction in the premises.

We are of the opinion that the orders were appealable. Section 7841 of the Compiled Laws of 1913 makes, among others, orders appealable, which affect "a substantial right . . . when such order in effect determines the action and prevents a judgment from which an appeal might be taken." It also makes appealable orders granting or refusing a new trial or sustaining or overruling a demurrer, and an order which "involves the merits of an action or some part thereof."

We are of the opinion that the orders overruling the motions for judgments on the special verdicts both involved the merits of the actions and prevented the rendition of judgments from which appeals might be taken, coupled as they were with the court's granting new trials on his own motion.

In the cases at bar both parties moved for judgments on the special verdicts of the jury. The cases were not similar to that of Persons v. Simons, 1 N. D. 243, 46 N. W. 969, where only special interrogatories were involved. The special verdicts covered all of the material issues of the cases and their findings were determinative of them. The defendant was entitled to the reception of these verdicts and to have judgments entered thereon. They were not cases of special interrogatories, where general verdicts could have been received and judgments entered in spite of the special findings. The orders, therefore, both involved the merits of the actions and prevented the rendition of

judgments from which appeals might be taken. *Robinson v. Washburn*, *supra*.

The orders appealed from are reversed, and the causes are remanded, with directions to enter judgments for the defendant, dismissing the several complaints.

GRACE, J. I concur in the result.

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STATE OF NORTH DAKOTA, Respondent, v. CLYDE NELSON  
DODDS, Appellant.

(169 N. W. 578.)

**Grand larceny — conviction for — sentence — appeal for judgment — evidence — charge to jury — objections — fair trial.**

Defendant was convicted of grand larceny and sentenced to state's prison for not more than five years nor less than one year, and he appeals to this court. He assigns error based on objections and exceptions to the evidence and the charge to the jury.

*Held*, the record shows no error and does show that defendant has had a fair trial.

Opinion filed November 4, 1918. Rehearing denied November 29, 1918.

Appeal from the District Court of Kidder County, Honorable *W. L. Nuessle*, Judge.

Defendant appeals.

Affirmed.

*E. T. Burke*, for appellant.

*Wm. Langer*, Attorney General, and *Theo. Koffel Bismarck*, and *J. W. Walker*, for respondent.

ROBINSON, J. In July, 1917, defendant was convicted of the crime of grand larceny and sentenced to state's prison for not less than one year nor more than five years, and he appeals. The information charges that on March 20, 1917, in Kidder county, defendant did feloniously steal and carry away numerous specified articles of personal

property of the value of \$325, the property of one Walter Truax. As described in the information the property consisted of wheat, oats, flax, grain sacks, horse harnesses, collars, and hand scale, and numerous other articles each valued at less than \$20.

In appellant's brief there are fifteen errors assigned on the rulings of the court during the trial and the instructions given to the jury, but there is no real attempt to show that the evidence is insufficient to sustain the verdict. Many persons were called as witnesses for the state and many as witnesses for the defendant, and the testimony, with the objections and exceptions, cover 139 pages. The proof showed beyond question that the property was stolen from Truax and that within a few days after the theft a considerable part of it was found in the possession of the defendant, and there is other circumstantial evidence pointing quite directly to the guilt of the defendant, and so it appears that the verdict is well sustained by the evidence.

Objection is made to the search of defendant's premises to discover the stolen property; to the refusal of the court to permit testimony that sacks and grain forks frequently became intermixed; to the insufficiency of the evidence to identify the forks and the horse collars and such like. Of course, in threshing time, it is common knowledge that grain forks and sacks may get intermixed, but there was no chance for such things to intermix from the time complainant left them on his place in March till the time when they were stolen.

In regard to the instructions, it is said the court told the jury that they might find the defendant guilty whether the property was taken by him or not, and that it is sufficient for the state to prove that all or any part of the property was stolen. So that under the charge, defendant might have been found guilty of grand larceny on proof that he stole a pitchfork. The answer to that is that it is wholly untrue. No judge would be so stupid as to give such an instruction to a jury. It is true the court did charge that it is not necessary for the state to prove that all of the property was taken or that it was taken by the defendant. As the evidence shows, the defendant may have used his hired man to take the property. The meaning of the sentence objected to when construed with the rest of the charge is that it was not necessary for the state to prove that defendant took the property with his own hands, and that to convict the defendant of some crime, it was



judgments from which appeals might be taken. *Robinson v. Washburn*, *supra*.

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GRACE, J. I concur in the result.

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In appellant's brief there are fifteen errors assigned on the rulings of the court during the trial and the instructions given to the jury, but there is no real attempt to show that the evidence is insufficient to sustain the verdict. Many persons were called as witnesses for the state and many as witnesses for the defendant, and the testimony, with the objections and exceptions, cover 139 pages. The proof showed beyond question that the property was stolen from Truax and that within a few days after the theft a considerable part of it was found in the possession of the defendant, and there is other circumstantial evidence pointing quite directly to the guilt of the defendant, and so it appears that the verdict is well sustained by the evidence.

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only necessary for the state to prove that all or any part of the property was taken as charged in the information. The court read to the jury the statute and instructed them with great care as to what constitutes grand larceny and petty larceny.

In § 29 of the charge, the court said to the jury: The state must prove to your satisfaction beyond a reasonable doubt that defendant took the property or aided and assisted another or others in doing so. When taken as a whole, the charge is manifestly fair and correct. There is no merit in any of the assigned errors. As it appears defendant has had a fair trial and he has been found guilty on competent evidence. Under the statute it is hardly conceivable that twelve men would have agreed to find defendant guilty if there was any reasonable doubt.

It is time for counsel to understand that this court will not reverse a verdict in either a civil or criminal case when it is well sustained by evidence, unless it appears that defendant has not had a fair trial. Hair-splitting objections avail nothing.

Judgment affirmed.

CHRISTIANSON, J. (concurring specially). In this case there was no motion for an advised verdict at the close of all the testimony. There was, however, a motion for a new trial. But the sufficiency of the evidence was not challenged on such motion. The failure to so assail the sufficiency of the evidence is not only persuasive evidence that defendant's counsel must have deemed the evidence sufficient, but precludes a review of the sufficiency of the evidence in this court. *State v. Glass*, 29 N. D. 620, 151 N. W. 229. A careful consideration of the evidence, all of which I have read, shows, however, that there is substantial evidence from which the jury might conclude that the defendant was guilty of the crime charged.

The first error assigned and argued on this appeal is that the court erred in permitting the names of certain witnesses for the prosecution to be indorsed upon the information after the jury had been selected, and afterwards permitting such witnesses to testify. The record shows the objection to be without merit. There is not the remotest possibility that the defendant was in any manner prejudiced by the court's ruling. Nor was the ruling assigned as error upon, or made one of the

grounds of the motion for a new trial. Hence, it cannot be considered on this appeal. See *State v. Glass*, *supra*.

The defendant asserts that the court in one instruction invaded the province of the jury. The instruction assailed related to the subject of possession of stolen property. It is unquestionably proper to give an instruction on this subject. 25 Cyc. 151 et seq. The instruction in this case in no manner instructed upon the weight or effect of the evidence. It left this, and every element inhering therein, for the jury to determine.

As stated in the opinion prepared by Mr. Justice Robinson, the defendant also contends that the court instructed the jury in effect "that they might find the defendant guilty whether the property was taken by him or not, and that it is sufficient for the state to prove that all or any part of the property was stolen." In this connection it is contended by defendant that the jury, under this instruction, might have returned a verdict for grand larceny even though they in fact found that the defendant had committed petit larceny only.

In my opinion the contention is wholly without merit. Not only did the court's instruction as a whole fully instruct upon the subject, but the record shows that after the jury had retired and deliberated upon the case, they returned and requested further instruction. A jurymen said: "We had some dispute, if we had to find in the man's possession an amount to exceed \$20,—if we had no reasonable doubt in our minds that he had taken stuff to the value of over \$20, and didn't find it all in his possession, would that be grand larceny." The court answered this query as follows: "I will answer that inquiry in this way,—that before you gentlemen can find this defendant guilty of grand larceny, each and all of you must be satisfied either that he stole property worth and of the value of more than \$20, or that he aided and assisted in so doing, and if there is any doubt as to the amount taken then the defendant is entitled to the benefit of the doubt, and if you are not satisfied beyond a reasonable doubt that the property stolen by the defendant, in case you find he stole any property, exceeds \$20 in value, then your verdict cannot be guilty of grand larceny, but must be guilty of petit larceny." This was the last instruction given by the court upon any subject. Upon this record I do not see how there could be any possible chance that the jury,

through inadvertence and misunderstanding of the instructions, returned a verdict for grand larceny, if in fact they believed that the defendant was guilty of petit larceny only. In my opinion the instructions were eminently fair to the defendant, and he has not the slightest cause for complaint.

Certain assignments of error are predicated upon the admission or exclusion of evidence. I do not care to discuss these in detail. I have examined them all with care, and fail to find a single ruling adverse to the defendant which is at all of a prejudicial, or even of a doubtful, character.

I have carefully examined the record of the proceedings had upon the trial, the transcript of the evidence, and the instructions to the jury, and am convinced that the defendant had a fair trial in every respect. I therefore concur in an affirmance of the judgment of conviction, and the order denying a new trial.

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COUNTY OF GRAND FORKS, in the State of North Dakota, a  
Municipal Corporation, Appellant, v. CREAM OF WHEAT  
COMPANY, a Corporation, Respondent.

(170 N. W. 863.)

**Taxation—assessments of corporations and associations—market value of stock—due process of law—location of property—assessments—constitutional rights.**

Section 2110, Comp. Laws 1913, relating to taxation of domestic corporations and associations, provides that every such corporation and association shall be assessed for the amount which its paid-up capital stock (as determined by the market value thereof, if it has market value, and if it has no market value, then by its actual value) exceeds the aggregate of the values of the real and personal property owned, and the amount of the total indebtedness (except current expenses) owed, by such corporation or association.

*Held*, that an assessment against a domestic corporation under the rule prescribed by this section does not take the property of such corporation

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NOTE.—For a discussion of the question of assessments of capital stock and corporate property in general, see notes in 58 L.R.A. 593, and 15 L.R.A.(N.S.) 952.

without due process, or deny to it the equal protection of the laws, even though all of its tangible property is located outside of the borders of the state.

*Held*, further, that such assessment does not infringe upon any rights guaranteed to such corporation by § 9, article 1, of the Federal Constitution, or by § 16 of the Constitution of North Dakota.

Opinion filed November 30, 1918.

From a judgment of the District Court of Grand Forks County, *Cooley, J.*, plaintiff appeals.

Reversed.

*Geo. E. Wallace* and *O. B. Burtness*, for appellant.

The law which prescribes the time of review of taxation assessments gives all the notice required; and the proceedings by which the valuation is determined, although it may lead to the sale of the delinquent property for taxes, is due process. *Merchants etc. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 492; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419; *Paulson v. Portland*, 149 U. S. 30, 37 L. ed. 637.

The process of taxation does not require the same kind of notice as is required in a suit at law. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; 4 Enc. U. S. Sup. Ct. Rep. 365, and note 5; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471; *Comstock v. Grand Rapids*, 54 Mich. 641; *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *Smith v. Marshall Town*, 86 Iowa, 516.

Greater latitude is permitted in the exercise of the taxing power than is accorded private suitors. 4 Enc. U. S. Sup. Ct. Rep. 365 and note 5; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471.

Failure to appear before the board of review of assessments estops a taxpayer to complain. *Comstock v. Grand Rapids*, 55 Mich. 641; *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *Smith v. Marshall Town*,

86 Iowa, 516; *Swenson v. McLaren*, 2 Tex. App. 331, 21 S. W. 300; *Mortz v. Detroit*, 18 Mich. 496; *Republican Ins. Co. v. Pollak*, 75 Ill. 300.

Unless restrained by constitutional provisions, the power of the state in matters of taxation is unlimited. *Elevator Co. v. Traill County*, 9 N. D. 216; 37 Cyc. 737; *Spencer v. People*, 68 Ill. 510; *Kirkpatrick v. New Brunswick*, 40 N. J. E. 46; *Florida R. Co. v. Reynolds*, 46 L. ed. 283; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Michigan R. Tax Cases*, 138 Fed. 236, affirmed in 201 U. S. 246, 50 L. ed. 744.

Regardless of the arbitrary selection and discrimination, when all persons in the same class are treated alike, taxation measures will be upheld by the courts. *People ex rel. v. Reardon*, 184 N. Y. 43, 8 L.R.A.(N.S.) 314, 77 N. E. 970; *Re McPherson*, 104 N. Y. 306, 10 N. E. 685; *Re Gould*, 156 N. Y. 423, 51 N. E. 287; *Kentucky R. Cases*, 115 U. S. 321, 29 L. ed. 414; *Magoun v. Bank*, 170 U. S. 283, 42 L. ed. 1037; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; 1 Cooley, Taxn. 3d ed. 260; *Michigan C. R. Co. v. Powers*, 210 U. S. 245, 301; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025.

Where taxes on franchises are privilege taxes, the rule requiring uniformity does not apply. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627; *Phoenix Assur. Co. v. Fire Dept.* 117 Ala. 631, 42 L.R.A. 468, 23 So. 843; *Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Scottish Union etc. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665; *Southern etc. Asso. v. Norman*, 98 Ky. 294, 31 L.R.A. 41, 32 S. W. 952; *State v. Fosdick*, 21 La. Ann. 434; *Portland Bank v. Apthorp*, 12 Mass. 252; *Connecticut etc. Co. v. Com.* 133 Mass. 161; *Com. v. Bank*, 5 Allen, 428; *State v. Ry. Co.* 45 Md. 361, 24 Am. St. Rep. 511; *State v. Telegraph Co.* 73 Me. 518; *State v. Railway Co.* 74 Me. 376; *Boston etc. Co. v. State*, 62 N. H. 648; *Standard etc. Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733; *Trenton Sav. Fund v. Richards*, 52 N. J. L. 156, 18 Atl. 582; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *Western etc. Tel. Co. v. Mayer*, 28 Ohio St. 537.

A corporate franchise is taxable. *Comp. Laws* 1913, § 2110; 37 Cyc. 816, 817; *Bank v. California*, 142 Cal. 276, 100 Am. St. Rep.

130, 64 L.R.A. 918, 75 Pac. 832; Spring Valley Waterworks v. Schotter, 52 Cal. 69; Horn Silver Min. Co. v. New York, 143 N. Y. 305, 36 L. ed. 164; Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 913; Southern Gum Co. v. Lyalin, 66 Ohio St. 578, 64 N. E. 564; State ex rel. Milwaukee Street R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; 2 Morawetz, Priv. Corp. 3922; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994; Horn S. M. Co. v. New York, 143 U. S. 325; Hamilton Co. v. Massachusetts, 6 Wall. 632, 638, 18 L. ed. 904; Central P. R. Co. v. California, 162 U. S. 91, 125; Cooley, Taxn. 3d ed. p. 686; People ex rel. v. Tax Comrs. 196 N. Y. 39; Bank of California v. San Francisco, 142 Cal. 276, 100 Am. St. Rep. 130, 75 Pac. 832; Commercial etc. Power Co. v. Judson, 21 Wash. 49, 57 L.R.A. 78.

The party assailing an assessment must show that the method by which the assessors arrived at the assessment was wrong, and that it does not represent the fair value of the property. *People v. Commissioners*, 99 N. Y. 154; *People v. Commissioners*, 104 N. Y. 240; *People v. Wells*, 184 N. Y. 275; Gray, Limitations of Taxing Power, p. 34; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994; *Carbon Iron Co. v. Carbon Co.* 39 Pa. 251; *Phoenix Iron Co. v. Com.* 59 Pa. 104; *State v. Philadelphia etc. R. Co.* 45 Md. 361; *Cumberland etc. R. Co. v. State*, 92 Md. 668.

*Brown & Gussner, Harry S. Carson, and Murphy & Toner*, for respondent.

The franchises of these corporations were not intended to be made subject to taxation as a separate item of personal property. *Comp. Laws* 1913, §§ 1524, 1530; *Henderson v. Com.* 99 Ky. 623, 31 S. W. 486; *State v. Duluth Gas & Water Co.* 76 Minn. 103.

The personal property of a corporation is assessed and also its capital stock; there is no franchise tax in North Dakota. *Beale*, Taxn. of Corporations both Foreign & Domestic, § 546.

A tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and no tax can be levied which includes property which is otherwise exempt. *Joyce*, Franchises, 1909, § 424, p. 752; *Bank of Commerce v. New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Pullman's Car Co. v. Pennsylvania*,



141 U. S. 18, 25; *Fargo v. Hart*, 193 U. S. 490, 498; *Com. v. Standard Oil Co.* 101 Pa. 145; *Fox's Appeal*, 112 Pa. 337; *Merchants Ins. Co. v. Newark*, 54 N. J. L. 138; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *State v. Haight*, 35 N. J. L. 279; *Nichols v. New Haven & N. Co.* 42 Conn. 103; *State v. Stonewall Ins. Co.* 89 Ala. 335; *Com. v. American Waterworks & G. Co.* 8 Pa. 268.

A tax on the value of the capital stock of a corporation is a property tax, and not a franchise tax. A state cannot tax property beyond its borders, nor attain the same end by taxing the entranced value of the stock of a corporation when the property lies permanently beyond its borders. *Delaware, L. etc. R. Co. v. Pennsylvania*, 198 U. S. 341; *Brown v. Houston*, 114 U. S. 622; *Com. v. Standard Oil Co.* 101 Pa. 145; *Fox's Appeal*, 112 Pa. 337; *Com. v. Delaware etc. R. Co.* 165 Pa. 44; *Bank of Commerce v. New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 25; *Fargo v. Hart*, 193 U. S. 490, 498, 499; *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 166 U. S. 185; *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 530; *Massachusetts v. Western U. Teleg. Co.* 141 U. S. 40; *Maine v. Grand Trunk R. Co.* 142 U. S. 217; *Pittsburgh, C. etc. R. Co. v. Backus*, 154 U. S. 421; *Cleveland, C. etc. R. Co. v. Backus*, 154 U. S. 439; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Louisville etc. Ferry Co. v. Kentucky*, 188 U. S. 385; *Com. v. West India Oil Ref. Co.* 138 Ky. 828, 129 S. W. 301.

Section 2110, Comp. Laws 1913, provides the only method of taxing intangible property. *State v. Duluth Gas & Water Co.* 76 Minn. 96; *State v. Leech*, 33 N. D. 513, 157 N. W. 492.

CHRISTIANSON, J. This is an action by the county of Grand Forks to recover from the defendant certain alleged delinquent personal property taxes for the years 1908 to 1914, both inclusive. The complaint alleges that the defendant is, and at all times therein mentioned was, a corporation organized under the laws of the state of North Dakota, with its principal place of business at the city of Grand Forks, in said Grand Forks county. And that in the year 1914 the county auditor under the direction of the state tax commission duly assessed certain property situated in said city of Grand Forks, to wit, "bonds and stocks"

for the years 1908, 1909, 1910, 1911, 1912, and 1913, as property having escaped taxation; that such property, during each of the said years, had been the property of the defendant and had not been assessed; that such assessment was thereafter equalized by the board of equalization of the county and later by the state board of equalization; that such taxes were duly entered by the county auditor and by him extended upon the tax lists of said county against the personal property of the defendant for each of said years at the same rate and for all the purposes for which taxes were levied upon property in said Grand Forks county in each of said years. It is further alleged that such personal property was duly assessed by the city assessor in the year 1914, and such assessment duly reviewed and equalized as provided by law. The complaint also shows that the action was brought pursuant to a resolution of the county commissioners directing its institution.

The defendant in its answer admits that certain assessments as alleged in the complaint were attempted to be made, but it denies the validity thereof and sets up various defects and irregularities in the proceedings culminating in the assessments for the respective years. It also avers that during none of the years did it own or possess any property whatsoever, subject to taxation in the state of North Dakota. In that connection it is alleged that the defendant's business during all of said time consisted in the manufacture and sale of a breakfast food, commonly known as "Cream of Wheat." And that prior to 1908, it duly complied with the laws of the state of Minnesota relating to foreign corporations, and obtained a license to do business in said state, and that since 1908 and prior thereto, the defendant has continuously maintained its factory and sales office in the city of Minneapolis, in the state of Minnesota, and has maintained no factory or sales office at any other place; and that it at no time during the years in question had or owned any real or personal property subject to taxation in the state of North Dakota. The case was tried to the court without a jury. The trial court resolved all questions raised with respect to the defects and irregularities in the various assessments in favor of the plaintiff, but ordered judgment in favor of the defendant for a dismissal of the action, for the reason that it had no property subject to taxation within the state of North Dakota. The plaintiff

has appealed from the judgment, and asks for a review of certain specified questions of fact.

The controlling facts in this case are not in dispute. The defendant is a corporation organized under the laws of the state of North Dakota. It was organized for the purpose, and its business consists, of manufacturing and marketing a cereal known as "Cream of Wheat." It has an authorized capital stock of \$50,000. The city of Grand Forks was designated in the articles of incorporation as its principal place of business. The defendant has qualified under the laws of Minnesota relating to foreign corporations, and obtained a license to transact business in such state, and has established and maintains its factory and sales office in the city of Minneapolis, in the state of Minnesota. The tangible property of the defendant, both real and personal, situated in Minnesota and other states, was assessed during the years in question, and the defendant paid the taxes assessed. The defendant has during all of the time maintained its existence as a corporation organized under the laws of this state, and has kept and maintained continuously a public office in the city of Grand Forks in this state for the transaction of its usual and corporate business.

The trial court found and the plaintiff admits that the assessments involved in this litigation were made under § 2110, Compiled Laws 1913, which provides: "The president, secretary, or principal accounting officer of any company or association, whether incorporated or unincorporated except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

- "1. The name and location of the company and association.
- "2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
- "3. The amount of capital stock paid up.
- "4. The market value, or if they have no market value, then the actual value of the shares of the stock.
- "5. The total amount of all indebtedness except the indebtedness of current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
- "6. The value of all real property, if any.
- "7. The value of its personal property.

"The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as 'bonds or stocks,' under subdivision 33 of § 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain." Section 2103, referred to in § 2110, *supra*, relates to the valuation by the assessor of personal property listed for taxation, and enumerated 27 items or classes of property to be listed and valued. Among the items enumerated are bonds and shares of capital stock of companies and associations.

"The preceding section,—§ 2102,—provides that "every person required by this chapter to list property shall, when called upon by the assessor, make out and deliver to the assessor a statement verified by oath, of all the personal property in his possession or under his control, . . . ; but *no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state.*"

It is undisputed that the defendant has not paid any tax whatever upon its corporate stock, or at all, in this state during the years in question. And there is no contention that the element of value or intangible property enumerated as taxable under § 2110, *supra*, has been assessed in any other state. Neither is there any contention, nor did the defendant make any showing upon the trial, that the assessments made against it in this state for the years in question in any manner exceeded the amounts which should have been assessed against it under the rule prescribed by § 2110, *supra*. The defendant, however, asserts that inasmuch as all of its tangible property is located beyond the borders of North Dakota, the intangible property owned by it is not subject to taxation in North Dakota; and that the defendant cannot be subjected to taxation under § 2110, *supra*, without violating the rights guaranteed to it by § 9, article 1, of the Federal Constitution, and § 1 of the 14th Amendment, and §§ 13 and 16 of the North Dakota Constitution.

In our opinion defendant's contentions cannot be sustained. The provisions of our state Constitution recognize all property as taxable, except that specifically exempted. N. D. Const. §§ 174-176. The legislature is directed to exempt certain classes of property from taxation, but until it has acted such property is subject to taxation, for this provision in the Constitution is not self-executing. *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577. Section 2110 was adopted as a part of chapter 126, Laws 1897. The avowed purpose of that statute was to provide for a general system of taxation. It provided that "all property subject to taxation shall be listed and assessed every year, at its value." Compiled Laws 1913, § 2093. It also provided that "the capital stock and franchises . . . of corporations . . . shall be listed in the county, town or district where the principal office or place of business of such corporation . . . is located in this state." Comp. Laws 1913, § 2095. The specific purpose of § 2110 was to prescribe the rule to be applied in the taxation of such companies or corporations domiciled in this state, as were not provided for by other provisions of law. The essential features of the section under consideration were adopted from Minnesota. In considering its purpose and effect, the supreme court of Minnesota, speaking through Judge Mitchell, said: "Without stopping to discuss at length the whole scheme of taxation provided in our tax laws, an analysis and comparison of its various provisions satisfy us that the legislature intended Gen. Stat. 1894, § 1530, to be the exclusive method of listing and taxing the property of all corporations and companies falling within the purview of that section. That section nowhere provides for the listing and taxation of corporate franchises as such, as a separate and distinct item of personal property. The method there provided for is the very common and most equitable and efficient one,—of reaching the franchises and other intangible property for purposes of taxation through the capital stock. The 'capital stock' (using the term in the sense in which it is evidently used in this section) is, as has been said, 'a business photograph of all the corporate possessions and possibilities,' and represents its business opportunities and capacities as well as its tangible assets. They enter into, and go to make up, the value of the stock. It is well settled that those franchises, although neither visible nor tangible are prop-

erty which may be taxed the same as any other property. Hence a very common method of taxing corporations and stock companies is to list and assess all their tangible property, real and personal, the same as the like property of other persons is listed and assessed, and also list and assess the capital stock at its actual or market value, less the value of its tangible real and personal property otherwise specifically listed and assessed. This system reaches every element of property value owned by the corporation, and at the same time avoids double taxation." *State v. Duluth Gas & Water Co.* 76 Minn. 103, 57 L.R.A. 63, 78 N. W. 1033.

That such intangible property may be subjected to a property tax has been held by the highest court in the land. In the *Adams Exp. Co. Case*, 166 U. S. 185, 219-225, 41 L. ed. 965, 977-979, 17 Sup. Ct. Rep. 604, the United States Supreme Court, speaking through Mr. Justice Brewer, said: "In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. . . . To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. . . . To say that there can be no such intangible property, that it is something of value, is to insult the common intelligence of every man. . . . Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. . . . Substance of right demands whatever be the real value of any property, that value may be accepted by the state for purpose of taxation, and this ought not to be evaded by any mere confusion of words. . . . The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

While a tax assessed under § 2110, *supra*, is in form a property tax, it is intended to reach, among other things, the primary corporate franchise granted to it by the state, and as to that it is in substance

or effect, to some degree at least, a tax upon the privilege of being a corporation. We do not, however, deem it necessary to enter into any discussion with regard to the name by which the tax is or ought to be designated. The question is one as to power of the legislature to provide for the imposition of the tax under the conditions prescribed, rather than the method selected. For "if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 233, 60 L. ed. 617, 619, 36 Sup. Ct. Rep. 261.

Section 2110 was part of the laws of this state at the time the defendant corporation was organized and its charter issued. The section has remained a part of our laws since its adoption. The defendant applied for and received its charter with knowledge of its provisions. It knew that a general corporation organized under the laws of this state was subjected to a tax upon its intangibles,—including the privilege granted to it by the state of being a corporation,—as prescribed by said section. "Undoubtedly," said Mr. Justice Hughes, speaking for the United States Supreme Court (*Hawley v. Malden*, 232 U. S. 112, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842), "the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or nonresidents. *Corry v. Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297. This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. *Id.* 476, 477; *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 293, 294, 54 L. ed. 482, 485, 486, 30 Sup. Ct. Rep. 326. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in these institutions may be taxed." *Rogers v. Hennepin County*, 240 U. S. 184, 60 L. ed. 594, 36 Sup. Ct. Rep. 265. See also 37 Cyc. 961.

Defendant places great reliance upon the decision of the United States Supreme Court in *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669, and contends that under the rule announced therein the taxation of defendant under

the provisions of § 2110, *supra*, constitutes a taking of its property without due process of law. The situation presented in the case cited was radically different from that presented in the case at bar. In the case cited there was included in the valuation of the property sought to be assessed in Pennsylvania the value of tangible property located permanently outside of that state. So, the effect of the assessment was to compel the railroad company to pay taxes in Pennsylvania upon tangible property located beyond the borders of that state. But that condition cannot possibly occur under § 2110, *supra*. That section specifically provides that the value of all real and personal property of the corporation shall be deducted from the value of the capital stock. Hence, the very situation which the court held to be fatal to the tax in the Delaware Case is guarded against by the express provisions of the statute under consideration. In this connection it should be noticed that the Supreme Court of the United States has expressly said that the Delaware Railroad Company Case is not applicable to a tax on intangible personal property, or even to a tax on tangible personal property, which has not acquired an actual situs. In speaking of the Delaware Railroad Case and certain other decisions cited by the defendant in this case, in *Hawley v. Malden*, 232 U. S. 1, 11, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842, the court said: "But these decisions did not involve the question of the taxation of intangible personal property; . . . nor do they apply to tangible personal property which, although physically outside the state of the owner's domicil, has not acquired an actual situs elsewhere. *Southern P. Co. v. Kentucky*, 222 U. S. 63, 68, 56 L. ed. 96, 98, 32 Sup. Ct. Rep. 13. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation." In the *Southern P. Co. Case*, the court said: "To say that the protection which the corporation receives from the state of its origin and domicil affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law." 222 U. S. 76.

It should be remembered that we are not dealing with a corpora-



tion organized to carry on a business of itself interstate commerce, and whose property, while situated in several states, in reality forms but one unit. (But even as to this class of corporations the United States Supreme Court has held that where one of such corporations voluntarily invokes the laws of a state and receives a grant of corporate existence, it cannot subsequently complain of the mode in which a tax, imposed upon it in accordance with the laws in force at the time it applied for and received its franchise, is measured. *Kansas City, M. & B. R. Co. v. Stiles*, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58.) But in the case at bar, we are dealing with a corporation organized for a purpose not of itself interstate commerce. We are dealing with an artificial being which was created, and now exists and exercises its powers, by virtue of the laws of this state, and which by the very law of its creation became a citizen of this state (222 U. S. 76), and from the inherent law of its nature cannot emigrate and become a citizen elsewhere. 222 U. S. 71. The nature and purpose of defendant's business is discussed in *Great Atlantic & P. Co. v. Cream of Wheat Co.* 224 Fed. 566. From what is there stated it is evident that the value of defendant's corporate stock depends largely upon its intangible property. It is a matter of common knowledge that the corporate stock in the defendant company is quite valuable. As already stated there is no contention that the assessments made, in fact, exceed the amounts which would have been properly assessable against it during the years in question under the rule provided by § 2110, supra. The defendant company appeared and filed protests against the assessments before the boards of equalization of the city of Grand Forks, and of the county of Grand Forks, but in neither of such protests did it attempt to show that the assessments were excessive under § 2110. The defendant has taken the position throughout that it is not liable to taxation in this state, and that it is beyond the power of our taxing officials to make any assessment against it under said section, or at all.

The defendant, also, makes the point that the evidence shows that it had no bonds and stocks, and hence that an assessment for such property cannot be sustained. It is true the defendant had no stocks and bonds of other companies. But the legislature merely provided that the value of defendant's corporate stock as determined under § 2110

should be inserted under this item in the assessment list. This is purely an administrative matter, and within the sphere of legislative control. See *Rogers v. Hennepin County*, 240 U. S. 184, 190, 60 L. ed. 594, 598, 36 Sup. Ct. Rep. 265.

We are of the opinion that the defendant was subject to taxation in this state, and that the assessment of taxes against it under the rule prescribed by § 2110 did not amount to a taking of its property without due process or deny to it the equal protection of the laws, neither did it infringe any other constitutional rights guaranteed to it by the constitutional provisions which it has invoked. If there is any constitutional objection to the rule prescribed by § 2110, *supra*, it is that it operates as a discrimination in defendant's favor. See *State v. Duluth Gas & Water Co.* 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032.

As already stated the trial court resolved all questions relating to the alleged defects and irregularities in the assessments in plaintiff's favor. The trial court so stated in a memorandum decision which it filed in the case. In its findings, however, the court found that the assessments for the years 1908 to 1913, both inclusive, were directly made by the tax commission. This finding we believe to be erroneous. While the evidence shows that the tax commission advised that the assessment be made, it also shows that the assessments were in fact made and entered and reviewed by the officers whose duty it was to do so. It has not been shown that the assessments are in any manner fraudulent or excessive.

It follows from what has been said that the judgment appealed from must be reversed, and judgment entered in favor of the plaintiff for the taxes involved herein. It is so ordered.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). This is an action by the county of Grand Forks to recover from the defendant about \$30,000 back taxes for the years 1906 to 1914, inclusive, on property that escaped taxation in those years.

The complaint avers that in 1914, under the direction of the tax commissioners, the county auditor of Grand Forks county duly assessed certain personal property situated in the city and county of Grand

Forks, to wit, *bonds and stocks*, for said years, as property having escaped taxation; that all of such personal property was then and there and had during each of said years been the property of the defendant and had not been assessed or taxed during any of said years. That such assessment was duly equalized by the boards of equalization and duly entered and extended on the tax list of said county against the personal property of the defendant. That during the year 1914 the city assessor of Grand Forks duly assessed for that year certain personal property of the defendant, in the city of Grand Forks, to wit, *stocks and bonds*, and the same was duly equalized and taxes extended against the same to the amount of \$3,180; and that the county commissioners duly passed a resolution to bring suit for the collection of such taxes.

The answer amounts to a general denial, and it avers that in said several years the defendant had no property in the city or county of Grand Forks, and that during said years it did not own stocks or bonds of any kind.

On all points of law and fact the trial court found against the plaintiff, and it appeals to this court.

The lengthy brief of counsel for plaintiff is swollen with needless citations and quotations from the courts of other states, and with points quite immaterial. For instance, it is contended that the tax in question is not really a property tax, as alleged in the complaint, but that it is a franchise tax, or a tax on the very existence of the corporation, because it is a corporation of this state,—and numerous authorities are cited to show that states may levy such a franchise tax. To all that the answer is that the complaint does not count on a corporate franchise tax, and such a tax is unknown to the laws of this state. To secure its corporate existence in accordance with the laws of the state, defendant paid to the state the requisite fee of \$50, and now it is contended that the state may tax its existence to the amount of three or four thousand dollars a year. But the state is not in that kind of business. The plaintiff brings this action to recover a judgment for the alleged taxes of seven years on personal property that escaped taxation. Of course, in such an action, the plaintiff has the burden of proof. The plaintiff must show the existence of property within the taxing jurisdiction, an assessment of the property in the manner

prescribed by law, a levy of the several taxes in pursuance of law. Const. § 175. Property must be assessed in the county, city, township, town, village, or district in which it is situated, *in the manner prescribed by law*. Const. § 179. The tax must be levied in pursuance of law on all property according to its value in money. Const. §§ 175, 176. The plaintiff has shown no compliance with these constitutional prerequisites to a valid tax, and it has been shown beyond dispute that in said several years the defendant did not have property to the amount of \$50, or even \$1, within the taxing jurisdiction, and that it was not the owner of any stocks or bonds, either in Grand Forks county or elsewhere. *The assessment is simply against "stocks and bonds," without any description of the same. If this refers to stocks or bonds of any party other than the defendant, the testimony shows that plaintiff never purchased or owned any such securities. If it refers to stocks and bonds issued and sold in the name of the defendant company, that is a liability, and not an asset. A company does not own the thing it sells. It may own blank forms of stock certificates, with authority to sell the same, but until a sale is actually made, the blank forms have no more force or effect than blank promissory notes. In a case of this kind, where a suit is brought to recover a judgment for taxes, the plaintiff must aver and prove facts sufficient to constitute a cause of action. In this case there is no such proof. There was no assessment, no property to assess, and there is no evidence showing the levy of any taxes. There is no occasion for a long story on or a speculative discussion of things which may have been. That which does not appear to exist is to be regarded as if it did not exist.* § 7264.

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FARGO SILO COMPANY, a Corporation, Respondent, v. PIONEER STOCK COMPANY, a Corporation, and H. N. Tucker, Appellants.

(170 N. W. 626.)

**Appeal and error — notice of appeal — duplicity — dismissal.**

1. Where a notice of an appeal embraces both an appeal from a default judgment and from an order refusing to vacate the judgment, the appeal will not, on motion, be dismissed as duplicitous.

**Appeal and error—undertaking on appeal.**

2. An undertaking on appeal, sufficient to operate as a supersedeas under the provisions of § 7825 of the Compiled Laws of 1913, which recites the appeal from an order refusing to vacate a judgment as well as the appeal from the judgment itself, and which is conditioned for the payment of damages and costs and for the payment of the judgment, if either the judgment or the order appealed from is affirmed, is a sufficient undertaking to support the appeal from the order and the judgment.

Opinion filed December 12, 1918.

Appeal from the District Court of Cass County, *A. T. Cole, J.*

Motion to dismiss interposed by respondent.

Motion denied.

*George H. Stillman*, for appellants.

Where both judgment and order denying a new trial are appealable both may be joined in one appeal. *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276; *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, 18 N. D. 598, 120 N. W. 757, 18 N. D. 532, 123 N. W. 667; *Shuman v. Ruud*, 32 N. D. 327, 155 N. W. 688.

*Pierce, Tenneson, & Cupler*, for respondent.

Two wholly independent appeals cannot be taken by one notice of appeal. *Prondzinski v. Garbett*, 9 N. D. 244; *State v. Gang*, 10 N. D. 331; *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774; *Kountz v. Kountz*, 15 S. D. 66, 87 N. W. 523; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20; *Hackett v. Gunderson*, 1 S. D. 479, 47 N. W. 546; *Williams v. Williams*, 6 S. D. 289, 61 N. W. 38; *Anderson v. Hultman*, 12 S. D. 105, 80 N. W. 165; *Gordon v. Kelley*, 104 N. W. 605; *National Surety Co. v. Cranmer* (S. D.) 131 N. W. 864. See also 3 C. J. p. 1224, note 43; *Corcorn v. Desmond*, 11 Pac. 815.

One undertaking on appeal is not sufficient where there is one appeal from a judgment and another from an order denying a motion for vacating and setting aside the judgment. *Corcorn v. Desmond*, 11 Pac. 815; *Comp. Laws 1913*, § 7824; *Carter v. Butte Creek M. & P. Co.* 131 Cal. 350, 63 Pac. 667 and cases cited; *Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418; *Carter v. Butte P. Co.* 131 Cal. 350, 63 Pac. 667; *Theisen v. Matthai*, 131 Pac. 747; *Home etc. Associates v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *Centerville, etc. Co. v.*

Bachtold, 109 Cal. 111, 41 Pac. 813; Heydenfeldt's Estate, 119 Cal. 346, 51 Pac. 543.

An insufficient bond is invalid for any purpose and cannot be cured by the filing of a new undertaking under § 954. 131 Pac. 748. See also *Home v. Wilkins*, 12 Pac. 799; *Re Heydenfeldt*, 51 Pac. 545.

**BIRDZELL, J.** Respondents have moved to dismiss this appeal on two grounds: First, that the appeal is duplicitous in that the notice embraces both an appeal from an order denying defendants' and appellants' motion to vacate the judgment, which had been entered by default, and an appeal from the judgment; and, second, that the undertaking is ambiguous and wholly ineffectual in that it treats as one the attempted appeals which are combined in the notice. Both appeals are clearly attempted to be taken in the one notice. It may be thus technically duplicitous, but it does not necessarily follow from this that it should be dismissed. It is held in this jurisdiction and elsewhere that a notice of appeal may embrace both an appeal from an order denying a motion for a new trial and an appeal from a judgment. Such a notice is also, technically, duplicitous. *Kinney v. Brotherhood of American Yeomen*, 15 N. D. 21, 106 N. W. 44; *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38; *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774; *Carpentier v. Williamson*, 25 Cal. 154; *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; *Chester v. Bakersfield Town Hall Asso.* 64 Cal. 42, 27 Pac. 1104. But yet, under our practice, both appeals are entertained, though embraced in the same notice. Unless there is some reason why an appeal of this character affects the rights of the respondent adversely, it should not be dismissed on the sole ground of its duplicitous character.

We can see no distinction between the character of duplicity involved in a notice of appeal which embraces both a judgment and an order denying a motion for a new trial, and a notice which embraces both a judgment and an order refusing to vacate the same. As pointed out by this court in an opinion written by Engerud, Judge, in *Kinney v. Brotherhood of American Yeomen*, 15 N. D. 21-27, 106 N. W. 44: "Errors of law can be reviewed on appeal from the judgment without a motion for a new trial; but the statute [which has since been

changed] forbids us to examine into the sufficiency of the evidence to support the verdict, unless the trial court has had an opportunity on a motion for a new trial to remedy the jury's erroneous decision of the facts. If the jury has taken an erroneous view of the evidence, it is an error at the trial which necessarily affects the judgment; and, although the trial court, after judgment, may refuse to grant a new trial, and thus commit error after judgment by refusing to rectify the error which the jury committed before, the fact remains that the inquiry on appeal as to the sufficiency of the evidence is in reality a review of an error before judgment. The trial court's ruling is merely a condition precedent to the right of the appellate court to examine into and remedy the error which the jury is alleged to have committed. Clearly, if the defeated party challenges the propriety of the judgment on the ground that there was error of law or fact in the proceedings which resulted in the judgment, he ought to be required to present all the reasons he assigns for reversing the judgment in a single proceeding, unless there is some good reason for not doing so."

Thus it is seen that, while separate appeals may be taken from the judgment and from the order denying a motion for a new trial, and while an appeal from the latter order is necessary in order that this court might, at least under the then existing statute, review the sufficiency of the evidence, an appeal embracing both matters was held proper, and a thing to be encouraged, for the reason that it tended to bring about a decision upon the merits of the whole controversy in one proceeding. Similarly, in the instant case, an appeal from a default judgment alone would bring nothing to this court except the judgment roll. But, where a motion has been made to vacate the judgment and the motion denied, the propriety of allowing the judgment to stand as a judgment binding the defendant, without a trial, is subject to a broader inquiry than would result if the court were confined to the judgment roll alone. It may also determine the propriety of the trial court's exercise of discretion in refusing to vacate the judgment. There is no distinction, in our opinion, in this respect, between an order refusing to grant a new trial and an order refusing to vacate a judgment. Viewed from the standpoint of the effect of granting or refusing to grant such motions, it will be seen that the effect in each case is substantially the same. In ruling upon one motion the court

may grant or refuse to grant a second trial, and upon the other the court may allow a trial to be had or disallow it. Nor can we see any distinction based on the circumstance that in granting a new trial the court is generally, though not always (as where based upon newly discovered evidence), moved by the prejudicial character of the proceedings anterior to judgment, as indicated in *Kinney v. Brotherhood of American Yeomen*, *supra*; whereas, in vacating a judgment, ordinarily there is not involved the legal sufficiency of any prior proceedings. The propriety of allowing the judgment to stand affords the real controversy in either case.

The decision of the South Dakota supreme court in the case of *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 605, where the opposite conclusion was reached, does not appeal to us as being correct. On the contrary, we regard this motion as being controlled by the principle announced by this court in the case of *Kinney v. Brotherhood of American Yeomen*, *supra*.

Passing to the second proposition,—that the undertaking is ambiguous and, as such, incapable of supporting either appeal. The undertaking purports to satisfy § 7825 of the Compiled Laws of 1913, which provides the form of an undertaking that will operate to stay the execution upon an appeal from a judgment. The body of the undertaking is as follows:

“Whereas, on the 15th day of December A. D. 1917, a judgment by default was entered in the above case in favor of the above-named plaintiff and respondent and against the above-named defendants and appellants in the sum of \$235.85 damages and costs; and

“Whereas, on the 11th day of February A. D. 1918, an order was entered in the above cause by the said district court, overruling and denying in all things defendants’ and appellants’ motion to set aside and vacate the said judgment,

“And the above-named defendants and appellants feeling aggrieved thereby hereby intend to appeal therefrom the supreme court of the state of North Dakota;

“Now therefore, we do hereby undertake, promise, and agree that the appellants will pay all costs and damages which may be awarded against them on said appeal, or on a dismissal thereof, not exceeding the sum of \$250, and also undertake in the sum of \$500 that if the said



judgment so appealed from, or any part thereof, is affirmed, or if said order is affirmed, or said appeal dismissed, the said appellants will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it is affirmed only in part, and all damages which shall be awarded against said appellants on said appeal, not exceeding the aggregate of the amounts above mentioned."

It will be noticed that the undertaking refers both to the order and the judgment, and that the principals and sureties undertake to pay all costs and damages which may be awarded against them on the appeal, or on the dismissal thereof, not exceeding \$250. In this respect, the undertaking is the same as the usual undertaking where the appeal is from a judgment and from an order denying a motion for a new trial. In addition, in order to operate as a supersedeas as to the judgment, it undertakes, in the sum of \$500, for the payment of the judgment if the same or any portion thereof is affirmed, "*or if said order is affirmed, or said appeal dismissed;*" and for the payment of damages "*not exceeding the aggregate of the amounts above mentioned.*" We are of the opinion that the foregoing undertaking gives to the respondent the full benefit of the statutory protection accorded him, and we are unable to see wherein he can be in any way prejudiced by the form of the undertaking.

For the foregoing reasons the motion to dismiss the appeal is denied.

GRACE, J. I concur in the result.

BRONSON, J., not being a member of the court when the case was submitted, did not participate.

PARK, GRANT, & MORRIS, a Corporation, Appellant, v. A. J.  
NORDALE, Respondent.  
GEORGE PIRIE COMPANY, a Corporation, Garnishee.

(170 N. W. 555.)

**Garnishment—counter affidavits—motion to dismiss.**

Under the laws of this state a garnishee action cannot be dismissed, in advance of trial upon the motion of the defendant supported by affidavit, on the ground that the averments of the affidavit for garnishment are untrue.

Opinion filed November 19, 1918. Rehearing denied December 21, 1918.

Appeal from the District Court of Cass County, *Cole, J.*

Plaintiff appeals from a judgment dismissing a garnishee action.  
Reversed.

*Pfeffer & Pfeffer*, for appellant.

A decision of the original state rendered subsequent to the adoption of a statute by another state has no more weight in the adopting state than that to which it is entitled by reason of its intrinsic merit. *Germania etc. Co. v. Ross-Lewin* (Colo.) 51 Pac. 488; *Myers v. McGavock* (Neb.) 58 N. W. 522; *Barnes v. Lynch* (Okla.) 59 Pac. 995; *Wyoming etc. Co. v. State* (Wyo.) 97 Pac. 337.

The court of the adopting state will not blindly follow the construction given a particular statute by the court of a state from which the statute was borrowed when the decision does not appeal to them as founded on right reasoning. *Elias v. Territory*, 9 Ariz. 15, 76 Pac. 605; *Anaconda Div. No. 1, A. O. H. v. Sparrow*, 29 Mont. 135, 64 L.R.A. 128, 101 Am. St. Rep. 563, 74 Pac. 197.

The general rule is that none of the parties to garnishment proceedings can invoke the aid of a court of equity to enforce his rights, or obtain relief from garnishment proceedings in the absence of any showing that he has exhausted his remedy at law, or that he is without any legal remedy. 20 Cyc. 1071 and cases cited.

Courts must confine themselves to the construction of the law as it is, and not attempt to amend or change the law under the guise of

construction. *Flowing Wells Co. v. Culin* (Ariz.) 95 Pac. 111; *Curry v. Lehman* (Fla.) 47 So. 18; *Ellis v. Boer* (Mich.) 114 N. W. 239; *Philadelphia Fire Asso. v. Love* (Tex.) 108 S. W. 158, 810; *Waldron v. Taylor* (W. Va.) 45 S. E. 336; *St. Louis etc. Co. v. Delk*, 158 Fed. 931, 162 Fed. 145; *Clark v. Kansas City etc. Co.* (Mo.) 118 S. W. 40; *Ex parte Pittman* (Nev.) 99 Pac. 700; *Com. v. Jonger*, 21 Pa. Super. Ct. 217; *Walker v. Vicksburg etc. Co.* (La.) 34 So. 749; *Austin v. Cahill* (Tex.) 88 S. W. 542, 89 S. W. 552.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention expressed in the statute, and where the meaning of the statute is plain, it must be given effect by the courts, or they would be assuming legislative authority. *Tynan v. Walker*, 95 Am. Dec. 152; *Stout v. Grant County* (Ind.) 8 N. E. 222; *Lahart v. Thompson* (Iowa) 118 N. W. 398; *Barron v. Kaufman* (Ky.) 115 S. W. 787; *Com. v. International etc. Co.* (Ky.) 115 S. W. 703; *Gooden v. Lincoln etc. Jury* (La.) 48 So. 196; *Cearfoss v. State*, 42 Md. 403; *Detroit v. Detroit etc. Co.* (Mich.) 120 N. W. 600; *State v. Woodruff* (N. J. L.) 52 Atl. 294; *Coxson v. Doland*, 2 Daly, 66; *State v. Barco* (N. C.) 63 S. E. 673; *Propst v. Southern etc. Co.* (N. C.) 51 S. E. 920; *Slingluff v. Weaver* (Ohio) 64 N. E. 574; *Union etc. Co. v. Com.* 69 Pa. 140; *Bradbury v. Wagenhorst*, 54 Pa. 180; *Ex parte Brown* (S. D.) 114 N. W. 303; *State v. Montella etc. Co.* (Utah) 98 Pac. 540; *United States v. Goldenberg*, 168 U. S. 95; *Atlantic etc. Co. v. United States*, 168 Fed. 175, affirming 153 Fed. 918; *United States v. Colorado etc. Co.* 15 L.R.A.(N.S.) 167, 157 Fed. 321; *United States v. Marks*, Fed. Cas. No. 15,721; *Ezekiel v. Dixon*, 3 Ga. 146; *United States v. Starn*, 17 Fed. 435; *Re Lime County Seat*, 15 Kan. 500; *Goble v. Simeral* (Neb.) 93 N. W. 235; *Woodbury v. Berry*, 18 Ohio St. 456; *Choctaw etc. Co. v. Alexander* (Okla.) 54 Pac. 42, 52 Pac. 944; *Miles v. Wells* (Utah) 61 Pac. 534; *Rossmiller v. State* (Wis.) 58 L.R.A. 93, 89 N. W. 839; *Lake County v. Rollins*, 130 U. S. 662; *Thornley v. United States*, 113 U. S. 310; *United States v. Tyler*, 105 U. S. 244; *Union etc. Co. v. Champlin*, 116 Fed. 858; *Webber v. St. Paul etc. Co.* 97 Fed. 140; *Farmers etc. Co. v. Oregon etc. Co.* 24 Fed. 407; *Prindle v. United States*, 41 Ct. Cl. 8; *Rodgers v. United States*, 36 Ct. Cl. 266, affirmed in 185 U. S.

83; *Horton v. Mobile etc. Comrs.* 43 Ala. 598; *Martin v. Martin etc. Co.* 27 App. D. C. 59; *Idaho etc. Co. v. Myer (Idaho)* 77 Pac. 628; *Louisville etc. Co. v. Gaines*, 3 Fed. 266; *Ogden v. Strong*, Fed. Cas. No. 10,460.

*A. C. Lacy*, for respondent.

Where the counter affidavits show that when the garnishment proceedings were instituted defendants had and still have property liable to execution to satisfy plaintiff's demand, it is proper, under the general law and practice of this country relative to attachments, to move upon affidavits to dismiss. *Orton v. Noonan*, 27 Wis. 572, 19 Wis. 174.

Our garnishment statute was copied from Wisconsin, where it has been held: "Where the garnishment proceedings were based upon a false affidavit, the proper procedure was either upon a motion or order to show cause to have same dismissed." *Orton v. Noonan*, 27 Wis. 572; *German-American Bank v. Butler-Mueller Co. (Wis.)* 58 N. W. 746; *Thoen v. Harnstrom (Wis.)* 73 N. W. 1011; *Graves v. Posner (Iowa)* 82 N. W. 445.

The words "duly verified" mean to conform by oath, and an affidavit is a written declaration under oath. *Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89, 92; *Boder v. State*, 179 Ind. 268, 94 N. E. 1009, 1011; *Taygard Valley Brewing Co. v. Villar Mfg. Co.* 184 Fed. 849; *State v. Trook*, 172 Ind. 558, 88 N. E. 930, 931; *Sommerfield v. Phoenix Assur. Co.* 65 Fed. 296.

An affidavit for garnishment which fails to state whether contract is express or implied is fatally defective. 2 Shinn, *Attachm. & Garnishments*, § 592; *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588.

CHRISTIANSON, J. This is an appeal in a garnishee action. It is undisputed that the garnishee summons and affidavit for garnishment, both in due and proper form, were served upon the defendant and the garnishee and filed with the clerk of the district court in the manner and within the time provided by law. The garnishee filed an affidavit admitting liability in the sum of \$1,051.57. The defendant did not interpose an answer in the garnishee action (nor does the record show whether he interposed an answer in the main action), but he made a

41 N. D.—22.

motion for a dismissal of the garnishee action on the ground that the plaintiff owned property in this state liable to execution sufficient to satisfy plaintiff's demand, and that consequently the averments to the contrary in the affidavit for garnishment were false. In support of the motion to dismiss, the defendant submitted his own affidavit setting forth certain property which he claimed to own, as well as the alleged value of such property. The plaintiff resisted the motion on the grounds that the question could not be raised, and that the court had no power or authority to determine the same, upon a summary application to dismiss, but that it must be raised by answer and determined as an issue upon the trial of the garnishee action. The court dismissed the garnishee action, and plaintiff appeals.

The first, and in our opinion the controlling, question which arises in this case is whether a defendant may move to dismiss a garnishee action in advance of trial on the ground that the affidavit for garnishment is untrue. As already stated no question is raised as to the sufficiency of the form and contents of the garnishee summons and affidavit for garnishment, or as to the regularity of the service and filing of these papers.

It should be noted at the outset that in this country garnishment is purely a statutory remedy. 9 Enc. Pl. & Pr. 809; 20 Cyc. 978; 12 R. C. L. 776. And under our statutes, attachment and garnishment are entirely separate and distinct remedies. See Code Civ. Proc. 1913, chap. 9. See also 20 Cyc. 978. The remedy by attachment was provided for in the laws of the territory of Dakota. And the principal provisions of our present law upon the subject are contained in the 1877 Code of the territory of Dakota. The remedy by garnishment was first provided in this state in 1895. Laws 1895, chap. 69. And the law as then enacted, with certain amendments subsequently made, constitute our present law on the subject of garnishment. Under the laws in force at the time the garnishment statute was enacted, it was provided that an attachment may be vacated on the motion of the defendant upon the ground, among others, "that the affidavit upon which it was issued is untrue." Comp. Laws 1913, § 7561. It was further provided that an attachment may be vacated upon the application of the defendant, by his furnishing a bond with sufficient surety, conditioned: (1) That the property shall be forthcoming in substantially as

good condition as it is at the time of the application to answer any judgment which the plaintiff may recover in the action; or (2) that the defendant will on demand pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a specified sum, which sum must be at least equal to double the amount of plaintiff's demand, as specified in the warrant of attachment; or, at the option of the defendant, equal to double the appraised value of the property attached according to the sheriff's inventory. Comp. Laws 1913, § 7556. As already stated these statutory provisions relative to attachments were in force at the time the legislature enacted the law relative to garnishment.

In the garnishment statute as originally adopted the legislature provided: "*The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all provisions of law relating to proceedings in civil actions at issue, including examination of the parties, amendments and relief from default or proceedings taken and appeals, and all provisions for enforcing judgments, shall be applicable thereto.*" Comp. Laws 1913, § 7581.

The statute prescribed the averments of the affidavit for garnishment, and the form of the garnishee summons. Comp. Laws 1913, §§ 7562, 7569. The garnishment action is instituted by service of the garnishee summons and affidavit for garnishment upon the garnishee, but such service becomes null and void unless these papers are, also, served upon the defendant either before or within ten days after service on the garnishee. Comp. Laws 1913, § 7571. The garnishee is required to answer the affidavit for garnishment by serving and filing an appropriate affidavit within thirty days from the time of service of the garnishment papers upon him. And the answer of the garnishee is deemed conclusive of the truth of the facts therein stated, unless the plaintiff within thirty days serves upon the garnishee a notice in writing, that he elects to take issue on his answer; in which case the issue so formed stands "for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed a complaint and the garnishee's affidavit the answer thereto." Comp. Laws 1913, § 7578. In case the answer of the garnishee discloses that any other person than the defendant claims the indebtedness of the

property in the hands of the garnishee, such party may be interpleaded. Comp. Laws 1913, § 7582. And *"the defendant may in all cases by answer duly verified, to be served within thirty days from the service of the garnishee summons on him, defend the proceeding against any garnishee upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant or for any other reason is not liable to garnishment; or, upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may at his option defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."* Comp. Laws 1913, § 7580.

The statute also provided that, "the defendant may, at any time after the complaint is filed and before judgment, file with the clerk of the court an undertaking executed by at least two sureties, resident freeholders of the state, to the effect that they will on demand pay to the plaintiff the amount of the judgment with all costs that may be recovered against such defendant in the action, not exceeding a sum specified, which sum shall not be less than double the amount demanded by the complaint, or in such less sum as the court shall upon application direct." Comp. Laws 1913, § 7586.

These provisions were all part of the original garnishment statute enacted in 1895, and have remained a part of the laws of this state since their enactment, without any change whatever, until in 1917, when the legislature provided "that in all cases where the defendant claims the debt or property garnished to be exempt, such claim of exemption may be heard and determined by the court at any time after the claim is made on three days' notice to the opposite party." Laws 1917, chap. 124, § 3.

It will be noted that the legislature expressly provided that a garnishment proceeding shall be deemed an action, and tried as such, and judgment rendered after trial upon the issues framed by the pleadings therein. It further provided that *"the defendant may in all cases by answer duly verified . . . defend the proceeding against any garnishee upon the ground that the indebtedness of the garnishee, or any property held by him is exempt from execution against such defend-*

*ant or for any other reason is not liable to garnishment."* § 7580, supra. Manifestly the specific grounds of defense enumerated in this section as available by way of answer directly involve the truthfulness of the averments of the affidavit for garnishment. The legislature has prescribed the manner in which the truthfulness of the averments of the affidavit for garnishment is to be determined. With the existing attachment statutes before it, it decided to provide for the release or discharge of a pending garnishment proceeding by the defendant's giving a bond in substantially the same form as one of the bonds provided for the release of an attachment. But it did not see fit to provide for the release of a garnishment, upon a summary application, on the ground of the falsity of the affidavit for garnishment, although the then existing laws relating to attachments provided that an attachment might be discharged in this manner upon the ground that the affidavit for attachment is untrue. On the contrary, the legislature expressly stated that the truthfulness of the averments of an affidavit for garnishment must be raised and determined in another manner. In other words when the legislature created the remedy by garnishment it provided the means whereby, and prescribed the conditions under which, a defendant might obtain a release of garnishment upon a summary application in advance of trial. It also specifically and unequivocally indicated the manner and form in which the truth or falsity of the averments of an affidavit for garnishment must be raised and determined. And it is a rule of statutory construction that where the legislature has said that a certain act shall be done in a certain manner, such affirmative requirement will be deemed to include an implied negative that it shall not be done in another manner. 26 Am. & Eng. Enc. Law, 605.

It is suggested that courts have inherent power to prevent abuse of process, and, hence, that in a case where a court becomes satisfied that any of the material averments of an affidavit for garnishment are false, it may properly dismiss the garnishee action. As already stated garnishment is a statutory proceeding. In the statute providing for the remedy the legislature also prescribed the procedure in detail. It specifically said that questions involving the truth of the averments of the affidavit for garnishment must be raised by answer, and that the issues so raised shall be disposed of as the issues in a civil action. Will it be con-



tended that a court in this state possesses inherent power to hear and determine upon a summary application, in advance of trial, whether the averments of a duly verified complaint (sufficient in form and substance) in a civil or criminal action are in fact true. To state the proposition is to answer it. Under the laws of this state no provision is made for striking a complaint on the ground that it is sham, but express provision is made for striking an answer on this ground. Comp. Laws 1913, § 7451. And in construing this section, this court, as well as the supreme court of the territory of Dakota, and the supreme court of the state of South Dakota, has held that a trial court may not determine upon a motion in advance of trial whether a general or special denial in an answer is in fact false and interposed in bad faith.

Respondent contends that our statutes relative to garnishment were adopted from Wisconsin, and that consequently we adopted the construction placed thereon by the supreme court of Wisconsin. He also contends that the supreme court of Wisconsin has held that a garnishment proceeding may be summarily dismissed upon motion where it is shown that the affidavit for garnishment is in fact false, and cites *Orton v. Noonan*, 27 Wis. 572, and *German-American Bank v. Butler-Mueller Co.* 87 Wis. 467, 58 N. W. 746, in support of his contention. He places especial reliance upon *Orton v. Noonan*, as having placed a settled construction upon the Wisconsin statute long prior to its adoption in this state. The rule contended for by the respondent is one of construction, and is utilized by the courts, as other rules of construction, to ascertain the legislative intent. The rule, while recognized by all courts, is subject to certain well-known limitations. See 36 Cyc. 1156; 36 Am. & Eng. Enc. Law, 702. The rule is based upon the theory that where the legislature of one state adopts a statute, which has received a definite and settled construction in another state, it will be presumed that the adopting legislature was aware of such construction, and (in absence of declaration to the contrary) is also presumed to have intended to adopt the known and definite construction placed upon the statute prior to its adoption.

While there is great similarity between the garnishment laws of this state and those of Wisconsin, we are not prepared to say that the laws of this state were adopted from Wisconsin. But even if they were, we are by no means satisfied that the rule of construction con-

tended for by respondent is applicable or in any degree controlling in ascertaining the intent of the legislature of this state. *Orton v. Noonan*, supra, upon which respondent's counsel places especial reliance, was commenced in 1865, and the decision of the supreme court of Wisconsin was filed in December, 1869. We are unable to state what the laws of Wisconsin relating to garnishment were at the time of this decision. Apparently they were not what they now are. For the 1878 revisers of the Wisconsin statutes, in a note prepared with respect to the chapter on garnishment, state, in part: "This chapter is new. The practice in garnishment is expensive, inconvenient, and variable. It is desirable that it should be cheap, easy, and certain. The effort is made to prescribe a practice which it is hoped will afford the desired ends."

So far as we are aware, the construction contended for by respondent has never been placed upon our garnishment laws, and the records of this court fail to disclose a single case wherein it has been sought to dismiss a garnishee action on the ground that the affidavit for garnishment is in fact untrue. The members of the 1917 legislative assembly were, also, apparently of the opinion that no such procedure existed. Because it was an idle ceremony on the part of the legislature to enact chapter 124, Laws 1917, if a garnishment action might be dismissed by motion in advance of trial on the ground that any of the material averments of the affidavit for garnishment was untrue. In our opinion the procedure adopted in this case is not sanctioned by, but is contrary to, the laws of our state.

The views already expressed make it unnecessary to consider the affidavit of the defendant, or the good faith of the plaintiff or its attorney in instituting the garnishment action. But as a matter of justice to plaintiff's attorney we deem it proper to say that, while defendant's affidavit tended to show that he owned property liable to execution greatly in excess of plaintiff's demand, there was no showing as to the amount of defendant's indebtedness. And upon the oral argument it was not denied that the defendant, pending this appeal, has been adjudged a bankrupt.

The judgment of the District Court is reversed, and the case remanded for further proceedings in conformity with this opinion.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). This is an action to recover \$700 for goods sold and delivered. Counsel for plaintiff made an affidavit which avers a belief that the defendant has not property within this state sufficient to satisfy the demand, and caused a garnishee summons to be issued and served thereby attaching over \$1,000 due from George Pirie Company to the defendant. Then defendant made an affidavit showing clearly that within the city of Fargo he owns certain described property worth \$18,000 over and above his exemption. The affidavit was not in any manner contradicted, and on an order to show cause the court made an order that the garnishee process be set aside, annulled and dismissed, and the garnishee released. The court justly gave as a reason that no debtor should be subjected to embarrassment of garnishee process when it fully and fairly appears by proper affidavits, not contradicted, that the debtor has abundant property subject to execution to meet any and all demands against him.

It is true, the statute does provide for the issuing of a garnishee summons on such an affidavit as was made in this case, but the statute does contemplate that such an affidavit shall not be made recklessly, and that a party swearing to a mere belief concerning a fact should first make reasonable search and inquiry in regard to the fact so as to have some just and reasonable ground on which to base his belief, but in any event, when a party obtains process of law—process of attachment or garnishment—by swearing to a belief which appears to be groundless and untrue, it is for him to tender a proper apology and to release the process. In such a case the duty of an attorney is to promptly undo the wrong, and not to persist in trying to sustain it.

In this case it is manifest that there was no ground for the garnishee and no ground for appealing to this court. We will not argue or cite authorities to show that it is the right and the duty of all courts to protect themselves and all parties to an action in their court from any abusive legal process. To sustain the garnishment would be a reproach to the law and the court.

The order should be affirmed with costs.

W. J. CURREN, Respondent, v. WILLIAM STORY, Appellant.

(170 N. W. 875.)

**Appeal and error — discretion of trial court.**

1. An application for a change of place of trial for the convenience of witnesses is addressed to the sound judicial discretion of the trial court, and the appellate court will not interfere unless an abuse of discretion is shown.

**Appeal and error — witnesses — change of place of trial.**

2. In the instant case it is held that an application for a change of place of trial for the convenience of witnesses was properly denied.

Opinion filed December 21, 1918.

Appeal from the District Court of Barnes County, *Coffey, J.*

Defendant appeals from an order denying his motion for a change of place of trial.

Affirmed.

*Sullivan & Sullivan*, for appellant.

It is the duty of the court to look to the affidavits as well as to the issues to be tried and determine from the entire showing made in which of the two courts a trial will be most accessible to the greatest number of witnesses required. *Clanton v. Ruffner* (Cal.) 20 Pac. 676; *Woolworth v. Klock*, 86 N. Y. Supp. 1111; *Church v. Swigert*, 90 N. Y. Supp. 939.

*M. J. Englert*, for respondent.

The place of trial in such cases is primarily for the trial court to determine, and its discretion in such matters will not be reviewed or interfered with by the appellate court unless a manifest abuse of discretion has been committed, the burden of proof of such facts being upon the warrant and appellant. *Comp. Laws* 1913, § 7418; *Boeren v. McWilliams*, 33 N. D. 339, 157 N. W. 117; *Kramer v. Heins*, 34 N. D. 507, 158 N. W. 1061.

The test of what is within the discretion of a court is whether the case may be decided either way. The only limitation upon the exercise of discretionary power is that it must not be abused. *Haynes, New Trial & App.* § 289, p. 1650.

CHRISTIANSON, Ch. J. The defendant appeals from an order denying his motion for a change of venue from Barnes county to Morton county. The motion for a change of venue was made solely upon the ground of convenience of witnesses, and under authority of § 7418, Compiled Laws 1913, which provides that "the court may change the place of trial in the following cases: . . . (3) When the convenience of witnesses and the ends of justice would be promoted by the change."

Of course, the party who applies for a change of venue on this ground has the burden of proof, and must establish affirmatively the facts entitling him to such change. 40 Cyc. 165. He must show clearly that the convenience of witnesses and the ends of justice will in fact be promoted by a change of venue. Cyc. says: "It should clearly appear that the convenience of witnesses will in fact be promoted, and the change should not be made merely for the convenience of a party to the action, or a single witness, or, in the absence of other considerations, for the convenience of one party's witnesses where those of the other would be equally inconvenienced." 40 Cyc. 137.

It is well settled that motions for a change of venue on this ground are addressed to the sound judicial discretion of the trial court. *Robertson Lumber Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082; *Kramer v. Heins*, 34 N. D. 507, 158 N. W. 1061; 5 Standard Proc. 13; 40 Cyc. 137; 4 Enc. Pl. & Pr. 442, 443. Cyc. says: "Applications on this ground are ordinarily addressed to the discretion of the court, which will not be interfered with unless manifestly abused, and various considerations may arise which will justify a denial of an application based upon this ground." 40 Cyc. 136.

In determining such application for a change of venue the trial court should "look to the affidavits as well as the issues to be tried, and determine upon the entire showing made in which of the two courts a trial will be most accessible to the greatest number of witnesses whose personal attendance the parties may require and reasonably expect to obtain." *Robertson Lumber Co. v. Jones*, 13 N. D. 112--116, 99 N. W. 1082. The statute requires not only that the convenience of witnesses, but that "the ends of justice," shall be promoted by the change. Hence, in determining the application the court may properly consider the consequences of a change of venue upon the

expedition and expense of the trial. 4 Enc. Pl. & Pr. 418; 5 Standard Proc. 14.

As already stated the applicant for a change of venue has the burden of proof. His application should state facts, not conclusions. "He should state the names of the proposed witnesses, their number, and their residence. . . . Likewise should be shown that the proposed witnesses are necessary and material, what is expected to be proved by them, and that the applicant cannot safely proceed to trial without" their testimony. 4 Enc. Pl. & Pr. 414-416; 40 Cyc. 162, 163; 5 Standard Proc. 14.

The complaint in the instant case states a cause of action for certain extras—labor and materials—furnished by plaintiff in constructing a certain building for the defendant in Mandan, North Dakota. No claim is made for the original contract price. The answer admits that the parties contracted for, and that the plaintiff constructed, a certain building. The answer also admits that the plaintiff furnished certain additional labor and material, and that the defendant agreed to pay therefor, but denies the amount and value thereof to be as alleged in the complaint. The answer also avers that under the terms of the written contract all differences between the parties must be submitted to arbitration. The answer further sets forth certain counterclaims, all relating to and based upon alleged departures from the original plans, defects in workmanship, and failure on plaintiff's part to comply with certain stipulations in the building contract.

The motion for a change of venue was based solely upon the pleadings in the case and the affidavit of one of defendant's attorneys. The defendant himself made no affidavit, and no reason is shown for his failure to do so. In his affidavit, defendant's attorney states that "the issues in said action as is apparent from the complaint and answer herein involve the showing to the jury of a great mass of detail in connection with the construction, manner of construction, material, and quality thereof, and appearance of said building; that the same also will require the evidence of many, several, and divers witnesses who have seen the said building and know the facts at issue between the parties hereto; that the trial of said action will also involve the testimony of many witnesses as to the values of the particular items at issue in the complaint and answer, and all of said witnesses to be

used in this action other than the plaintiff and defendant themselves, are residents of Mandan or the vicinity thereof, in Morton county, and the convenience of witnesses would therefore be greatly subserved by changing the place of trial of said action from Barnes county to Morton county." And "that a viewing of these premises by the jury will be proper in this case, and the proper request will be made therefor, and in no better way can the facts with reference to the appearance and general condition and general construction of said building be shown to said jury."

It will be noted the affidavit of defendant's counsel does not state the names of any proposed witnesses, nor does it state what any proposed witness or witnesses will testify to or even what defendant expects to prove by them.

The plaintiff's attorney made an opposing affidavit wherein he states that the plaintiff and defendant are both residents of Barnes county; that the plaintiff is absent and unable to make the affidavit in his own behalf, and hence the affidavit is made by the attorney for him. The affidavit states that, in addition to the facts appearing from the pleadings, he has made further investigation and has been informed and from such information states as a fact: "That the great bulk of the witnesses live more conveniently to Valley City than they do to Mandan, and that it would greatly inconvenience the plaintiff to have the said case transferred to Mandan for trial, for the reason that he has several witnesses in said cause, and among them the bookkeeper and draftsman, and that all of the material and books are kept in Valley City, North Dakota, where the said plaintiff has his office and where his records are kept and maintained; that the plaintiff has a number of witnesses that will be needed and must necessarily be called, in view of the dispute and denial set up in defendant's answer, to substantiate the various items of plaintiff's complaint, and that if the said cause were transferred to Mandan, North Dakota, that he would be put to a great expense and inconvenience in the calling of the said witnesses, besides taking them away from their work, to a great detriment of the plaintiff and to the witnesses themselves."

We have already stated the rules of law applicable to motions for a change of venue on the ground of inconvenience of witnesses. These rules govern the trial courts in determining such motions. The question

whether a change of venue should be granted is primarily one for the trial court. When a motion for change of venue is made on a discretionary ground, the appellate court merely reviews the ruling of the trial court for the purpose, and to the extent, of ascertaining whether that court abused its discretion and affected an injustice.

In the case at bar we are entirely satisfied that the trial court was right in refusing to order a change of venue. The order appealed from must be affirmed. It is so ordered. It is also ordered that the record be forthwith returned to the District Court.

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**BOVEY-SHUTE LUMBER COMPANY, a Corporation, Respondent,  
v. OSCAR ERICKSON, Simon Simonson, Northern Land &  
Mortgage Company, a Corporation, et al., Defendants, Northern  
Land & Mortgage Company, Appellant.**

(170 N. W. 628.)

**Public lands—mechanic's liens—homesteads.**

Under § 2296, U. S. Rev. Stat. which provides that no lands acquired under the homestead laws of the United States shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, a mechanic's lien which arises by operation of law upon the filing of a lien statement for building materials furnished does not attach to land acquired under the homestead laws, where the debt was contracted and the materials furnished before the patent was issued.

Opinion filed November 16, 1918. Rehearing denied December 24, 1918

From a judgment of the District Court of Ward County, *Leighton, J.*, the defendant, Northern Land & Mortgage Company, appeals.

Reversed.

*Hanchett & Johnston*, for appellant.

Lands held under the United States Homestead Laws prior to the issuance of patent shall not in any event be held liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. U. S. Rev. Stat. § 2296; Comp. Laws 1913, § 6824; *Green v. Tenold*, 14 N. D. 46.



In that case it was decided and practically conceded that there could not be any lien upon the land for the reason that such land was, under the Federal statutes, exempt from mechanics' liens prior to the issuance of patent; but the trial court did hold that the lien was good upon the buildings and entered judgment directing the issuance of a special execution against the buildings and for their sale and removal from the land. *Paige v. Peters*, 70 Wis. 178, 35 N. W. 328.

*McGee & Goss*, for respondent.

A homestead entryman has, after making final proof, an equitable title which may be transferred by him. *Dale & Sons v. Griffith* (Miss.) 46 So. 543; *Laughlin v. Fariss*, 7 Okla. 1, 50 Pac. 254; *Peter-son v. Sloss*, 39 Wash. 207, 81 Pac. 744; *Kent Co. v. Clar*, 79 Wash. 543, 140 Pac. 556; *Walker v. Johnson* (Fla.) 43 So. 771; *Nicholson v. Comgden*, 95 Minn. 188, 103 N. W. 1034; *United States v. Lumber Co.* 67 C. C. A. 1, 131 Fed. 668, defined in 200 U. S. 321, 50 L. ed. 499; *McClung v. Steen* (C. C. A.) 32 Fed. 372; *Gourley v. Countryman*, 18 Okla. 220, 90 Pac. 427 (in this case the authorities of this point are collected); also *Brake v. Blaine* (Okla.) 153 Pac. 158.

A receiver's final certificate conveys the equitable title to the person named in the certificate. *United States v. Lumber Co.* 67 C. C. A. 1, 131 Fed. 668, defined in 200 U. S. 321, 50 L. ed. 499; *McClung v. Steen* (C. C. A.) 32 Fed. 372; *Gourley v. Countryman*, 18 Okla. 220, 90 Pac. 427 (in this case the authorities of this point are collected); also *Brake v. Blaine* (Okla.) 153 Pac. 158.

The exemption (U. S. Rev. Stat. § 2296) no longer applies after final proof has been made and patent issued. *Ruddy v. Rossi* (Idaho) 154 Pac. 977; *Flannigan v. Forsythe*, 6 Okla. 225, 50 Pac. 152; *Hobb v. Case Thresh. Mach. Co.* (Okla.) 135 Pac. 395; *Mercantile Co. v. Davis*, 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495; *Leonard v. Ross*, 23 Kan. 292.

CHRISTIANSON, J. This action was brought to foreclose a mechanic's lien. The lien is claimed for certain building material which it is alleged that the plaintiff sold and delivered to the defendant Oscar Erickson between April 7, 1907, and April 20, 1907. And it is alleged that such material was used in the construction, alteration, and repair of a certain dwelling house and barn situated on the

premises involved in this action. The defendant Northern Land & Mortgage Company appeared and answered. It denied that the plaintiff had a mechanic's lien, and asserted that the said Northern Land & Mortgage Company is the owner of the premises by virtue of a sheriff's deed received by it upon the foreclosure of a certain mortgage against said premises.

The material facts in the case are undisputed. The defendant Oscar Erickson was an entryman upon the premises involved in this action, under the homestead laws of the United States of America. On April 4, 1907, he submitted his final commutation proof upon such homestead, at the local land office. The receiver's final certificate was not issued upon such proof until April 6, 1907. On April 4, 1907, after the final proof had been submitted, but two days before the final certificate was issued, Erickson contracted with the plaintiff's agent for the building material involved in the action. The evidence shows, and the trial court found, "that on April 4, 1907, and after said final proof was made . . . the said Oscar Erickson did enter into a contract with the plaintiff pursuant to which the plaintiff agreed to furnish building materials necessary for the erection, alteration, and repair of a certain barn on said premises, and the said plaintiff did on April 4, 1907, agree to and with the said defendant Oscar Erickson to furnish and deliver to said Oscar Erickson certain building materials as would be necessary for the erection, alteration, and repair of said building on said premises; that thereunder and pursuant to said contract the plaintiff furnished all of said materials in amounts and on the dates" specified in the findings of fact. The first load of building material was delivered on April 4, 1907, and the remainder on April 12, 13, and 20, 1907. The mechanic's lien was filed in the office of the clerk of the district court on August 10, 1907. The lien was filed in the office of the district court on August 10, 1907. It recited, "that between the 4th day of April, 1907, and the 20th day of April, 1907, said Bovey-Shute Lumber Company furnished certain material for the erection, alteration, and repair of a certain barn (on the land in controversy) under and pursuant to a contract therefor made with Oscar Erickson, who was then the owner of said land." The first load of building material was delivered on April 4, 1907, and the remainder on April 12, 13, and 20, 1907.

On April 13, 1907, the defendant Oscar Erickson, who was an unmarried man, for value received, executed, acknowledged, and delivered to the Northern Land & Mortgage Company a mortgage covering the premises involved in this controversy to secure the payment of the sum of \$800. This mortgage was duly recorded in the office of the register of deeds on April 16, 1907. Such mortgage was subsequently duly foreclosed by advertisement and the premises sold to the Northern Land & Mortgage Company at such foreclosure sale in March, 1913. No redemption was made from such sale, and a sheriff's deed was issued to the appellant on March 13, 1914.

The trial court made no allowance for the materials delivered on April 4, 1907, but adjudged the lien to be a valid first lien upon the land for the materials furnished on April 12, 13, and 20, 1907. The usual decree of foreclosure was entered, and the defendant Northern Land & Mortgage Company appeals.

The questions presented on this appeal are: (1) Did the mechanic's lien claimed by the plaintiff ever attach to, and become a valid lien against, the land? and, (2) if such lien is valid, is it prior to the lien of the mortgage under which appellant received the sheriff's deed for the premises?

A determination of the first question depends upon and involves a construction of § 2296, U. S. Rev. Stat. Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575, which reads as follows: "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The power of Congress to create the exemption provided by § 2296, *supra*, is settled beyond question. And it is wholly beyond the power of a state in any manner to limit or impair the exemption granted by the Federal statute. 32 Cyc. 1082, 1083; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905. The authorities are all agreed that the exemption extends to those who have commuted their homestead entries. See *McCorkell v. Horron*, 128 Iowa, 324, 111 Am. St. Rep. 201, 103 N. W. 988; *Clark v. Bayley*, 5 Or. 343.

"The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader." *Anderson v. Carkins*, *supra*. Section 2296, *supra*, was enacted to effectuate this policy and

encourage the settlement of the public lands. 32 Cyc. 1082. While the courts are all agreed as to the validity of the section, and the duty of the courts to enforce it, they have differed as to the construction to be placed upon it. Some courts have held that "the issuing of the patent" refers to the time when the patent ought to issue, and not to the mere clerical work of issuing it, and hence the homestead is liable for debts contracted after the right to a patent became complete, although before it was actually issued;" but other courts have held "that the date of the actual issuance of the patent fixes the time when the liability of the land begins, and it is not liable for debts contracted before that time, although after the right to the patent was complete." 32 Cyc. 1083. The Supreme Court of the United States has never passed upon the question.

It will be noticed that Congress used the term "the issuing of the patent." It did not say, "The issuing of the final receiver's receipt." The lawmakers were certainly familiar with the various steps in the acquisition of lands under the homestead laws. They were aware that upon a final proof a final receiver's receipt was first issued by the local land office, and that at some subsequent date a patent was issued through the General Land Office. There are fundamental distinctions between the two instruments. The final receiver's receipt "is an acknowledgment by the government that it has received full pay for the land, that it holds the legal title in trust for the entryman, and will in due course issue to him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of the state laws in respect to conveyances, inheritances, etc." United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 337, 338, 50 L. ed. 499, 505, 506, 26 Sup. Ct. Rep. 282. The significance of the patent, however, should not be overlooked. For "it must be remembered that the latter is the instrument which passes the legal title, and that until it is issued the legal title remains with the government, and is subject to investigation and determination by the Land Department." Ibid. See also Healey v. Fornan, 14 N. D. 449, 105 N. W. 233. In other words, the issuance of receiver's final certificate does not divest the government of title to, or the Land Department of jurisdiction over, the land. The title remains in the government until patent is issued, and the Land Department has jurisdiction over the land and may

cancel the entry and final certificate at any time prior to the issuance of patent, or the confirmation of the entry by the following provision in § 7 of the Act of March 3, 1891, chapter 561, 26 Stat. at L. 1095, 1099, Comp. Stat. §§ 5116, 5118, 8 Fed. Stat. Anno. 2d ed. pp. 825, 868. "That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him." See *Lane v. Hoglund*, 244 U. S. 174, 61 L. ed. 1066, 37 Sup. Ct. Rep. 558.

It is suggested by respondent's counsel that this case is in effect controlled by *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394. We believe counsel is in error. *Adam v. McClintock* involved a mortgage,—a lien voluntarily created by virtue of contract. The courts are generally agreed that the exemption created by the Federal statute is designed merely to protect the settler against the involuntary liens arising by operation of law, and does not preclude him from voluntarily creating a lien by way of mortgage. 32 Cyc. 1084. See also *Hafemann v. Gross*, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80; *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400. This being so, the mortgage is subject to the familiar equitable principles that the mortgagor is estopped from denying the recitals and assertions of title contained in the mortgage, and that the after-acquired title inures to the benefit of the mortgagee. But the lien involved in this case is an involuntary one. And the authorities all agree that a mechanic's lien is within the prohibition of the Federal statute. 27 Cyc. 28; *Green v. Tenold*, 14 N. D. 46, 116 Am. St. Rep. 638, 103 N. W. 398; *Spiess v. Neuberg*, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Weber v. Laidler*, *supra*. Whether a mechanic's lien filed under our present statute, which requires the written consent of the owner before a lien may be filed, also falls within the prohibition of the statute, is not before us, and on this question we express no opinion.

With all due respect for the authorities to the contrary, we are of the opinion that § 2296, *supra*, means what it says. Its language is plain and unequivocal. It says that lands acquired under the pro-

visions of the homestead laws shall in no event "become liable to the satisfaction of any debt *contracted prior to the issuance of the patent therefor.*" If Congress had intended that the exemption should apply only to debts contracted prior to the issuance of the receiver's final certificate it would doubtless have said so. In order to ascertain the legislative intention the primary rule is that a statute is to receive that meaning which the ordinary reading of its language warrants. And if the language is clear and admits of but one meaning, the law-making body should be deemed to have meant what it has plainly expressed, and in such case there is no room for construction. 26 Am. & Eng. Enc. Law, 598; 36 Cyc. 1114.

The statute under consideration was enacted for the protection of the homesteader. The prohibition is clear and direct. It was the intent of the lawmakers as expressed in the statute that the homesteader should be protected against all involuntary liens arising by virtue of debts "*contracted prior to the issuing of the patent.*" It is our duty to enforce the statute as enacted, and give effect to the intention of the lawmakers as expressed by the plain and unequivocal language which they have used. It may be noted that the interpretation which we place upon the statute is in harmony with the views of the United States district court of this district, and those of the supreme court of our sister state, South Dakota. See *Re Cohn*, 171 Fed. 568; *Blair v. Mayer*, 24 S. D. 563, 565, 140 Am. St. Rep. 797, 124 N. W. 722.

In the opinion of the writer, speaking for himself alone, no court has ever passed upon the precise question presented in this case, and the facts in this case readily distinguish it from all the authorities that have been cited. In the instant case it is undisputed that the debt was contracted on April 4, 1907,—two days before the final receiver's receipt was issued. The first material was delivered on that day. We therefore have a situation where the debt in satisfaction of which an involuntary lien is sought to be enforced was *contracted before the receiver's final certificate was issued.* The cases cited by respondent involved a situation where the debt had been contracted subsequent to the issuance of the receiver's final certificate, and prior to the issuance of the patent. And in *Ruddy v. Rossi*, 28 Idaho, 376, 154 Pac. 977, which respondent cites as the most recent judicial expression on the subject, the majority opinion lays great stress on the fact that the

debt had been contracted after receiver's final certificate had been issued, and virtually distinguishes between such debts and debts contracted before the issuance of such certificate. And the dissenting opinion in that case assumes that the issuance of the final certificate is the point which the majority members deemed controlling. The holding of the majority on this particular question is reflected in ¶ 1 of the syllabus, which reads: "Under § 2296, U. S. Rev. Stat. Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575, relating to homesteads, and providing that no lands acquired under such section shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, land so acquired is not liable for a debt contracted prior to the making of final proof and receiving final certificate entitling the entryman to a patent." Respondent's counsel contends that in *Leonard v. Ross*, 23 Kan. 293, the debt arose before the receiver's final certificate had been issued. An examination of the opinion, however, does not sustain the contention. It is true the decision does not show that final certificate had been issued, nor is any reference made in the opinion either to the issuance or nonissuance thereof. It does appear, however, from the statement of facts that the entryman made final proof and paid the purchase moneys to the local land office on May 19, 1874, and that the debt for which the land was held liable arose just before October 12, 1874. It is a matter of common knowledge to anyone familiar with the practice of local land offices that a receiver's final certificate is issued, if possible, on the same day that the proof is submitted and the purchase moneys paid to the officers of the local land office. If the receiver's final certificate is not issued on the same day that the final proof is submitted at the local office, it is issued shortly thereafter, except in cases where there is some occasion for delay arising either by reason of defects in the final proof testimony, such large amount of other business at the local land office as prevents the officers from acting upon the final proof, or some other unusual cause. But where business is normal the receiver's final certificate is ordinarily issued either on the day final proof is submitted or within a very short time thereafter. Hence, it seems clear that the final certificate must have been issued in *Leonard v. Ross* before the debt involved in that case arose, and so far as the opinion shows the

final certificate may have been and probably was issued on May 19, 1874, or very shortly thereafter.

It follows from what has been said that the mechanic's lien claimed by the plaintiff in the instant case never attached to the land, and that the judgment of the court below to the contrary is erroneous and must be reversed. The judgment is therefore reversed and the cause remanded, with directions that judgment be entered in harmony with the views expressed in this opinion.

ROBINSON, J. (dissenting). This is an appeal from a judgment decreeing the validity and superiority of plaintiff's lumber lien for the sum of \$47.70, with interest, amounting to \$105.10, and a sale of the premises to satisfy the same. From this judgment the Northern Land & Mortgage Company appeals and demands a retrial of the entire case. As alleged in the complaint it appears that in April, 1907, the plaintiff sold and delivered to defendant Oscar Erickson lumber and material to be used and which was used in the construction of a barn on the land in question. The delivery was at dates and in amounts thus:

1907. April 4, .....	\$23.45
" 12, .....	30.70
" 13, .....	15.80
" 20, .....	1.20
	<hr/>
Total amount .....	\$71.15

On October 15, 1907, Erickson made to the plaintiff his promissory note for \$71.15 due in one year, with interest at 12 per cent, and it is wholly unpaid. On April 29, 1907, there was duly filed a mechanic's lien for the material. On the same land to secure \$800 and interest, Erickson made to appellant a mortgage. It was dated April 12, and filed April 16, 1907. The mortgagee objects to the priority of the lumber lien on these grounds:

1. The insufficiency of evidence to show that the lumber was used in the construction of the building on the land.
2. For the reason that at the time of contracting for the lien on April 4, 1907, Erickson did not own the land.

On the first point the evidence does fairly show—as found by the



trial court—that the lumber was bought and used for the construction of a barn. Erickson was in possession and in need of a barn on the land, and the proof is that the lumber was taken and used in the building, and when Erickson gave the mortgage, the bulk of the lumber was on the ground or in the barn on the land, and that was constructive notice to the mortgagee. On April 4, 1907, Erickson made final proof before the United States Land Office at Minot and commuted a homestead entry on the land in question. He paid for it to the receiver of the United States Land Office \$177.13. The receiver's receipt for the same was issued on April 6 and recorded April 16, 1907. Of course, the patent did not issue until several months afterwards. Erickson contracted for the lumber and made final proof and payment for the land two days before the issuing of the receiver's receipt, and long before the issuing of a patent. Hence, the principal claim of appellant is based on this section of the United States Revised Statutes:

Section 2296 (Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575): No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor. But that statute does not apply to this case because Erickson did not acquire the land under the homestead laws. He commuted his homestead entry and made final proof and payment for the land "as provided by law granting pre-emption rights." Hence, on his making such proof and payment his title was that of a purchaser under the pre-emption laws.

The moment Erickson made his final proof and payment he became the real owner of the land, and his title was not different from that of any other purchaser. The government held in trust for him only the bare legal title.

Counsel cites as directly in point, *Paige v. Peters*, 70 Wis. 178, 5 Am. St. Rep. 156, 35 N. W. 328. In that case the party contesting a lien for material claimed the land under the homestead laws, and not as a purchaser or commuted homestead pre-emption cash entry, and the debt was contracted for material furnished and used two months prior to the time of the making of final proof. The Wisconsin decision was entirely correct, but it is not at all in point. As this court has held the Mechanic's Lien Law is remedial and equitable, and it should be liberally construed to effect its purpose.

On April 4, 1907, when Erickson bargained for the lumber, he had a perfect equitable title to the land. There is no dispute concerning the lumber which was furnished to Erickson on April 4, 12, 13, and 20, A. D. 1907. It amounted to \$71.15.

On October 15, 1907, Erickson gave his promissory note for the same, with interest at 12 per cent. As a subsequent lien holder the mortgage company does rightfully object to interest in excess of 7 per cent. Hence, the judgment should be corrected by striking out the words "forty-seven and seventy-one hundredths dollars," wherever the same occurs, and 12 per cent, and in lieu thereof inserting "seventy-one and fifteen hundredths dollars, and annual interest thereon at 7 per cent per annum," and as thus modified the judgment should in all things be affirmed.

BRUCE, Ch. J. I concur in the result reached, but not in the distinction sought to be made by Judge Robinson between a commutation proof and one under the homestead laws proper.

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JOHN C. SWEET, Respondent, v. A. B. ANDERSON, Appellant.

(170 N. W. 869.)

**Negotiable instruments—promissory note—holder must in due time establish his good faith.**

1. A holder in due course of a promissory note must establish his good faith, as a matter of law, either by direct and uncontradicted testimony or by circumstances which show consistently the good faith of his purchase so that no fair-minded person can draw any other inference therefrom.

**Negotiable instruments—good faith—testimony—consideration of surrounding circumstances—when good faith is question for the jury.**

2. Where the plaintiff, claiming to be the bona fide holder of a promissory

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**NOTE.**—For a comprehensive discussion of the question as to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see notes in 29 L.R.A.(N.S.) 351; 44 L.R.A.(N.S.) 395; and L.R.A.1918F, 1148,—where it is held that under a statute providing that knowledge of facts sufficient to put a prudent man upon inquiry is sufficient to constitute notice to the purchaser, the question as to what was sufficient to place a prudent man upon inquiry was one of fact for the jury.

note in due course, does not testify that he purchased the same in good faith, and where the surrounding circumstances show that for several years prior thereto, he was the attorney for, and a stockholder in, the corporation named as payee in, and the indorser of, said note, and was possessed necessarily or impliedly of such knowledge as might lead fair-minded men to draw different inferences concerning his good faith, the question of the good faith of such holder is for the jury.

Opinion filed January 7, 1919.

**Action on promissory note.**

Appeal from judgment entered in the District Court, Sargent County, *F. P. Allen*, Judge.

Reversed and new trial ordered.

*O. M. Sem* and *Forbes & Lounsbury*, for appellant.

"If a note be not properly indorsed it is not transferred in good faith under the merchant." 4 Am. & Eng. Enc. Law, 311; 7 Cyc. 791 & 926; Comp. Laws 1913, § 6934; *Massachusetts Loan & T. Co. v. Twitchell*, 7 N. D. 440; *Vickery v. Burton*, 6 N. D. 245.

"A special indorsement specifies to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument." *American Nat. Bank v. Lundy*, 21 N. D. 167; *Farmers & M. St. Bank v. Shaffer*, 154 N. W. 485.

"A breach of warranty is a good defense to a note given for the purchase price of the machinery warranted." 8 Cyc. 55; 4 Am. & Eng. Enc. Law, 154; *Vickery v. Burton*, 6 N. D. 245; *National Bank of Commerce v. Feeney*, 70 N. W. 874; *Judd v. Dennison*, 10 Wend. 512; *Hays v. Kingston*, 16 Atl. 745; *Bank of Evansville v. Kurth*, 166 N. W. 658.

"A note may be shown to have been conditionally delivered and a valid defense to it thus established." 8 Cyc. 55; 4 Am. & Eng. Enc. Law, 151; *Selma Sav. Bank v. Hinkle*, 166 N. W. 748; *Porter v. Andrus*, 10 N. D. 558; *Citizens State Bank v. Garcian*, 22 N. D. 576; *First St. Bank v. Kelly*, 30 N. D. 84; *Stockton v. Turner*, 30 N. D. 641; *Quinn v. Bane*, 164 N. W. 788; *Merchants Exch. Bank v. Luckow*, 35 N. W. 434; 4 Am. & Eng. Enc. Law, 321; Comp. Laws 1913, §§ 6934, 6943; *Knowlton v. Schultz*, 6 N. D. 417; *Landouer v. Sioux*

Falls Imp. Co. 72 N. W. 467; Keer v. Anderson, 16 N. D. 36; Citizens State Bank v. Garcian, 22 N. D. 576; Merchants Exch. Bank v. Luckow, 35 N. W. 434; Bank of Montreal v. Richter, 57 N. W. 61; Kirby v. Berguin, 90 N. W. 856.

The unauthorized delivery of the notes to the payee was in fraud of the rights of the defendant. Porter v. Andrus, 10 N. D. 558.

"Actual notice is not indispensable constructive notice arising from the relationship of the parties, or from the circumstances attending the transaction being sufficient." 7 Cya. 940, 947, 957, and cases cited. Arnd v. Aylesworth, 123 N. W. 1000; Comp. Laws 1913, § 7286.

"Although good faith may be shown in some cases by inference from facts, failure to state that the purchase was in good faith is a strong circumstance to negative good faith." Landauer v. Sioux Falls Implement Co. 72 N. W. 467; Walters v. Rock, 18 N. D. 45; American Nat. Bank v. Lundy, 21 N. D. 167; McCarty v. Kroreta, 24 N. D. 395.

"The jury need not accept as true the undisputed testimony of a party to the action, but may weigh it as any other evidence." J. S. Brown & Bros. Mercantile Co. v. Sherod, 101 Pac. 481; Lewis v. Coupe, 85 N. E. 1053; Lautner v. Kann, 39 Atl. 55; Elwood v. Western U. Transp. Co. 45 N. Y. 549; Lavalleur v. Hahn, 149 N. W. 257; Greenwald v. Ford, 109 N. W. 516; McKnight v. Parsons, 113 N. W. 858; Arnd v. Aylesworth, 123 N. W. 1000; Merchants Nat. Bank v. Grigsby, 149 N. W. 626; Mercantile Guaranty Co. v. Hilton, 77 N. E. 312; 8 Cya. 289, 290; German-American Nat. Bank v. Kelley, 166 N. W. 1053; Commercial Bank v. Paddick, 57 N. W. 687; Landouer v. Sioux Falls Imp. Co. 72 N. W. 467; Porter v. Andrus, 10 N. D. 558; Vosburgh v. Diffendorf, 23 N. E. 801.

"If the decision is to be reached by drawing inferences from other facts, ordinarily the jury alone can draw these inferences." Arnd v. Aylesworth, 123 N. W. 1000.

*C. G. Mead*, for respondent.

"Good faith does not require the purchaser of a note to make inquiry as to the purpose for which the note was given, or as to the existence of possible defenses, and mere knowledge or notice of suspicious circumstances will not defeat a recovery." American Nat. Bank v. Lundy,

21 N. D. 167, 129 N. W. 99. Following *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867.

"An indorsement without recourse to the indorser does not impair the negotiable character of the instrument, and it may not be regarded as evidence of any infirmity in the instrument or defeat the title of the person negotiating the same." *Leavitt v. Thurston*, 38 Utah, 351; *Page v. Ford*, 65 Or. 450; *Bank of Sampson v. Hatcher*, 151 N. C. 359; 7 Cyc. 957; 8 C. J. 519; *Moust v. Wells*, 76 Minn. 438, 79 N. W. 499.

"Knowledge of the consideration of a bill or note is not notice of a subsequent failure of the consideration." 8 C. J. 510; *American Nat. Bank v. Lundy*, 21 N. D. 167.

"The fact that the plaintiff is a stockholder in the original payee company is not in itself an inference of bad faith." *Iowa Nat. Bank v. Sherman & Bratager*, 17 S. D. 396, 97 N. W. 12; *American Nat. Bank v. Lundy*, 21 N. D. 167; *Coleman v. Valentine* (S. D.) 164 N. W. 67; *Stevens v. McLachlan* (Mich.) 79 N. W. 627.

BRONSON, J. This is an action upon a promissory note; the defendant appeals from the judgment entered for \$538.65 upon a verdict directed. In the month of September, 1913, the defendant gave this note for \$350, maturing November 1, 1914, which was indorsed and sold to the plaintiff herein on October 31, 1913. At the close of the testimony the trial court granted a motion of the plaintiff to direct a verdict in his favor upon the ground that the undisputed evidence showed that the plaintiff was a holder in due course. The appellant herein challenges this ruling of the trial court particularly upon the grounds that the note was not properly indorsed, and that the question whether plaintiff was a purchaser bona fide was for the jury. The note involved was duly indorsed to the plaintiff by the payee by an indorsement which read, "Pay to John C. Sweet or order without recourse to us. Imperial Machinery Co. Alex Currie, Pres." The note in other respects is regular, and shows on its face a complete and regular negotiation. Comp. Laws 1913, § 6915.

The plaintiff, however, contends that this note was in fact transferred to the Imperial Machinery Company, Inc., which was a new company that arose out of the reorganization of the old company and

which took over its assets, and that therefore the note was not properly indorsed to the plaintiff.

From the record we are satisfied that there is no merit in this contention, for the evidence sufficiently shows that the original Imperial Machinery Company was in existence at the time the note was negotiated to the plaintiff, and the record does not affirmatively show that such company ceased to be the owner and holder of said note at the time of its negotiation.

Our serious attention is engaged by the second contention of the appellant.

The evidence concerning this matter is substantially as follows: The Imperial Machinery Company, the payee in the note, was a corporation engaged in the manufacture and sale of Giant shock and hay loaders and gas tractors; the plaintiff, a lawyer, for several years was the attorney for such company, assisted in its organization, and received its stock in payment of his legal fees and expenses upon such organization. He was and still is a stockholder in the company. His relation as attorney did not cease until about sixty days prior to the purchase of the note in question. On July 9, 1913, the defendant gave an order on a printed blank for one of these loaders to an agent of the company named Dugan. The order contained a guaranty that such loader was of good material and would do good work, if properly handled. The price was stated to be \$700 payable in cash upon delivery or by the execution of a note due not later than November 1, 1913, with the further added provision that if the loader saved enough in hired help it should be paid for in cash, and, if not, the defendant should have two falls in which to make payment. There was still a further provision added, to the effect that after three days' trial the use thereafter of the loader should constitute acceptance, and settlement should then be made therefor. The defendant did not settle after three days' trial; he received the loader about July 30, he pulled it out in the field for use about August 25th, it bothered and would not work. Dugan came up and saw it work, he advised defendant that, if it would not work, he would make it right, and if it did not work satisfactory it was not defendant's loader. That he kept on trying to use it because he was advised so to do. On September 11, 1913, he executed two notes for \$350 each,—one the note in suit, and another, payable as to one half thereof, that fall, and the balance thereafter.

The defendant testifies that he gave these notes to the cashier of a bank in Delameter, with instruction to him to keep them until defendant advised him that he was perfectly satisfied with the loader.

The plaintiff testified that the company owed him for some stock, and that this stock and a check for \$62 formed the consideration for this note and another note which he purchased at the same time; that he made inquiry as to the financial standing of the defendant; that he did not see the contract or make further inquiry about the defendant; that he assumed that the note was given for machinery of the company. He did not testify directly that he purchased the note in good faith.

From the record the burden is on the plaintiff to establish his good faith. Either he must establish this good faith by direct and uncontradicted testimony, or by circumstances which show unequivocally evidence of good faith, in order that the court as a matter of law may so direct; the testimony must not only be such as to show consistently the good faith of such purchase, but it must also be such that no fair-minded person can draw any other inference therefrom. *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Arnd v. Aylesworth*, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000.

The plaintiff in his business connections as attorney and stockholder must have known of this order form and its guaranties. He must have known of its provisions for making settlement. With this knowledge and the further assumption that he made, that this was a note for machinery, he knew or could have known readily by simple reference to the order in question whether settlement on this note was made with or without trouble. Good faith as a matter of law cannot be established by inference; it must be established by direct testimony.

Accordingly, we are satisfied that the plaintiff has not established in this record his good faith, as a matter of law, in the purchase of this note, where he does not testify directly that he purchased the same in good faith, and where the surrounding circumstances do not establish unequivocally such good faith so that any fair-minded person can draw only such inference therefrom.

The judgment of the trial court is reversed and a new trial ordered.

ROBINSON, J. I concur. The facts show plaintiff was not a purchaser in good faith.

**THE AMERICAN COAL BRIQUETTING COMPANY, Respondent, v. MINNEAPOLIS, ST. PAUL, & S. STE. MARIE RAILWAY COMPANY, Appellant.**

(170 N. W. 568.)

**Damages — value — evidence.**

In the instant case it is *held* that there is no competent evidence of value.

Opinion filed November 30, 1918. Petition for Rehearing denied January 8, 1919.

Appeal from the District Court of Ward County, North Dakota, *Leighton, J.*

Defendant appeals.

Reversed.

*John E. Greene* and *John E. Erdall* (*Alfred H. Bright*, of counsel), for appellant.

*E. R. Sinkler* and *M. O. Eide*, for respondent.

ROBINSON, J. The complaint avers that in April, 1915, the plaintiff owned certain buildings and property on section 12-160-80, of the value of \$7,000. That in operating its line of road which runs northwest from Minot, defendant by its locomotive engine started a prairie fire on going up the hill from Kenmare, and that the fire extended to and burned up the property. The answer is a general denial.

As appears from the map, section 12 is 4 miles east and 2 miles north from Kenmare, and it is 5 or 6 miles from any point on the railroad. The jury found a verdict for \$1,700. The appeal presents two questions: (1) Does the testimony fairly show that the locomotive set the fire? (2) Was the property of any special value?

Though it is very doubtful, it may be conceded that in regard to the setting of the fire there was evidence sufficient for the jury, and though there is some reckless testimony, there is really no evidence that the property had any real value at the time of the fire. *It had been so long abandoned the presumption is that it was of no value.* The property consisted mainly of temporary frame buildings which had



been constructed in 1902, and they had been used about four or five years in the operation of a coal mine, and for ten years the mine and the buildings had lain vacant and abandoned; and of course during such time the property had rapidly depreciated in value and had come to wreck and ruin. The grass and weeds had grown up from year to year so as to almost cover the buildings. The property had been completely abandoned and left without the least care or protection. It was not even thought of sufficient value to make it worth while to protect it by plowing a fire break around it. There is some testimony in regard to the cost price of the property and considerable reckless testimony, but no evidence in regard to the value of the property at the time of the burning. *There is nothing to show the possibility of making an honest dollar from the renting of the property, the use of it, or the wrecking of it, or the sale of it.* When the mine played out and ceased to pay operating expenses, the mining property lost its value and it was abandoned and allowed to go to wreck and ruin.

The value of the property depends, not on its cost, but on its utility or productiveness. The walls of Londonderry, the pyramids of Egypt, the walls of China, have ceased to be of any value. The same is true of thousands of buildings and mining properties that were once valuable. Doubtless, ten years prior to the fire, the property in question would have been of some value to tear down and sell as wreckage. There was no evidence that it had any such value at the time of the burning, and the burden of proof was on the plaintiff.

BIRDZELL, J. (concurring specially). I concur in a reversal of the judgment in this case and in remanding the case to the district court for another trial. It is my opinion that there is evidence of value upon which a jury would be warranted in finding a verdict for the plaintiff in some sum; but it is apparent from the record that the verdict upon which the judgment was entered was a compromise between the values as testified to by the plaintiff's main witness and those sought to be established by the defendant. The record further discloses that the jury had the benefit of an ample description of the situation and the condition of the property destroyed. But, in view of the fact that the only evidence of value which the plaintiff adduced was shown to be evidence based upon construction costs incurred at a time when it

was contemplated that the property would become part of a going concern, it is of such an unsatisfactory character that it ought not to be allowed to stand as the basis of the verdict. The evidence of value should relate to the condition of the property at about the time of its destruction.

GRACE, J. (concurring specially). I am of the opinion that the judgment should be reversed and a new trial granted for the reason that the proof with reference to the value of the buildings burned was deficient. While there is testimony showing the value of the buildings at the time they were burned, upon cross-examination it was shown the estimate of such value was based upon what it would cost to construct the buildings. Testimony as to the cost of the buildings, where it is shown they were built many years prior to the time of their destruction by fire, could hardly be considered a proper basis upon which to estimate the damages. The question is: What is the value of the buildings at the time of their destruction by the fire? I concur in the reversal of the judgment and the granting of a new trial.

#### On Petition for Rehearing.

PER CURIAM. Plaintiff has petitioned for a rehearing. Much of the petition is devoted to criticism of certain expressions contained in the majority opinion. Leaving philological questions on one side, the basic reasoning announced in all of the former opinions is the same, *viz.*, that there was no legally sufficient evidence as to the value, to sustain the verdict for the amount returned by the jury in this case. And we are still of the opinion that this holding was correct.

Plaintiff called only one witness, one Wright, to testify to the value of the buildings. On direct examination he testified, in response to leading questions, as to the value of the property. On his cross-examination it was developed that his former testimony was in fact not as to value, but as to the original cost of construction. No reasonable man can read Wright's testimony and arrive at any other conclusion.

Plaintiff contends that inasmuch as there was no objection to Wright's testimony when it was offered, it became competent evidence and must be so considered. The rule sought to be invoked is well established, but it does not go to the extent contended for by plaintiff.

While the failure to object may constitute waiver of the incompetency of the evidence, "it is not a waiver of the right to question its legal effect or its legal sufficiency." 9 Enc. Ev. 113. In the case at bar the legal insufficiency of the evidence did not become apparent until the witness was cross-examined. The plaintiff had the burden of proof. It was required to sustain this burden by substantial evidence—legally sufficient—to warrant reasonable men in arriving at certain conclusions. *State Bank v. Bismarck Elevator & Invest. Co.* 31 N. D. 102, 153 N. W. 459. In the case at bar the evidence adduced by the plaintiff, in our opinion, showed the cost of construction of the buildings, and not their value at the time of destruction or anywhere near that time. There was undisputed evidence showing the deteriorated condition of the buildings at the time of their destruction. The evidence offered by the defendant was to the effect that the buildings at the time of their destruction were of far lesser value than that fixed by the jury in their verdict. Hence, we were and are of the opinion that the verdict as returned has no substantial support in the evidence, and that the jury erred in its decision of the facts. *Kinney v. Brotherhood of American Yeomen*, 15 N. D. 21, 27, 106 N. W. 44. The defendant specifically assailed this decision by a motion for a new trial. In such motion he specified particularly that there was no competent evidence showing the value of the property destroyed to be more than \$750 in all. The court denied a new trial. But inasmuch as there was no substantial and legally sufficient evidence in support of the verdict as returned, the trial court should have set aside the verdict and ordered a new trial. 29 Cyc. 832-835.

Rehearing denied.

**BISMARCK GAS COMPANY, a Corporation, Plaintiff, v. DISTRICT COURT OF BURLEIGH COUNTY, North Dakota, and Honorable W. L. Nuessle, Judge of said District Court, Defendants.**

(170 N. W. 878.)

**Municipal corporations—public service corporations—franchise.**

As it appears, the city of Bismarck granted to plaintiff's assignor a franchise to use the streets of the city of Bismarck to serve gas to the city and the people. The franchise did not fix the rates for gas, but it did clearly fix the highest rate that might be exacted. And the grantee agreed in writing to furnish gas at prices not to exceed the limited rate. There is no claim that the contract was made without consideration, or that it was effected by fraud, duress, or imposition. Hence the gas company has no right to charge for gas any sum in excess of the limited rates.

Opinion filed November 30, 1918. Petition for rehearing denied January 9, 1919.

Application for writ of prohibition directed to the District Court of Burleigh County and Honorable W. L. Nuessle, Judge of said Court.

Alternative writ quashed and action dismissed.

*Miller, Zuger, & Tillotson*, for plaintiff.

Section 3818, subdivisions 5 and 7, Compiled Laws of 1913, does not authorize making of a contract which either fixes or regulates rates, but merely authorizes the granting of a franchise or license to use the streets. *Madison v. Madison Gas Co.* (Wis.) 8 L.R.A.(N.S.) 520; *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L.R.A. 177; *Benwood v. Public Service Commission* (W. Va.) L.R.A.1915C, 261; *State ex rel. Webster v. Superior Ct.* (Wash.) L.R.A.1915C, 287; *Central Transp. Co. v. Pullman Palace Car Co.* (U. S.) 35 L. ed. 55.

*H. F. O'Hare*, City Attorney, for defendants.

Where a city grants a franchise to a corporation in which franchise the maximum rates allowed to be charged for gas were stated, and the

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NOTE.—Authorities passing on the question of effect of provision of franchise in respect to rates upon the right to raise the rates are collated in a note in L.R.A. 1916C, 287, on right to raise rates of public service corporation fixed by franchise.

41 N. D.—25.

corporation duly accepts same, the corporation is bound by the terms of the franchise. *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. Rep. 756; *Vicksburg v. Vicksburg Waterworks*, 206 U. S. 496, 27 Sup. Ct. Rep. 762; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 Sup. Ct. Rep. 77; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. 957; *Cleveland v. Cleveland Elec. R. Co.* 201 U. S. 529, 26 Sup. Ct. Rep. 513; *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. Rep. 410; *State v. Seattle etc. R. Co.* 64 Wash. 167, 116 Pac. 638; *State v. Seattle etc. R. Co.* 62 Wash. 124, 113 Pac. 260; *Noblesville v. Noblesville Gas Co.* 157 Ind. 162, 60 N. E. 1032; *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Selectmen v. Worcester Consol. St. R. Co.* 199 Mass. 279, 85 N. E. 507; *Galveston etc. R. Co. v. Galveston*, 90 Tex. 396, 39 S. W. 96; *Detroit v. Ft. Wayne etc. R. Co.* 95 Mich. 456, 54 N. W. 958; *Omaha Water Co. v. Omaha*, 147 Fed. 1; *State v. Superior Ct.* 67 Wash. 37, 120 Pac. 861; *Manitowoc v. Manitowoc etc. Traction Co.* 145 Wis. 13, 129 N. W. 926; *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. Rep. 50.

The right of the state to regulate rates by compulsion is a police power, and distinct from the right of a city to contract with a public service company upon the terms of a franchise. *Woodburn v. Pub. Service Com.* 82 Or. 114, 161 Pac. 391; *Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 296; *State v. Sup. Ct.* 67 Wash. 37, 120 Pac. 861; *Monroe v. Detroit etc. R. Co.* 187 Mich. 364, 153 N. W. 669; *Manitowoc v. Manitowoc, etc. Traction Co.* 145 Wis. 13, 129 N. W. 925; *Charleston Consol. R. Co. v. Charleston*, 92 S. C. 127, 27 S. E. 390; *Duluth St. R. Co. v. Railroad Com.* 161 Wis. 24, 152 N. W. 887; *Calif. Oregon Power Co. v. Grants Pass*, 203 Fed. 173; *Northwildwood v. Bd. of Pub. Utility Comrs*, 88 N. J. L. 81, 95 Atl. 749; *Worcester v. Worcester Consol. St. R. Co.* 196 U. S. 539; *Bellevue v. Ohio Valley Water Co.* 245 Pa. 114, 91 Atl. 236; *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 142 Ga. 841, 83 S. E. 946; *Christophulus v. Geo. Pub. Service Corp.* 142 Ga. 848; *Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812; *State v. Superior Ct.* 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78; *S. P. Ry. Co. v. Campbell*, 230 U. S. 537, 33 Sup. Ct. Rep. 1027.

A franchise given by a city is a contract within the protection of

the Federal Constitution, subject to the right of the state to regulate the rates named in such franchise. *Logansport Gas Co. v. Perue*, 89 Fed. 185; *Muncie Natural Gas Co. v. Muncie*, 60 L.R.A. 822; *Westfield Gas & Min. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Marble Co. v. Ripley*, 10 Wall. 339; *Franklin Telegraph Co. v. Harrison*, 175 U. S. 459, 471; *Guffy v. Smith*, 237 U. S. 101; *Berg v. Erickson*, 234 Fed. 817; *Hoyt v. United States*, 149 U. S. 1; *Re Jauvin*, 174 Mass. 514, 55 N. E. 581; *Pond, Public Utilities*, §§ 431, 432; *Mpls. Gas Light Co. v. Mpls. (Minn.)* 168 N. W. 588.

ROBINSON, J. The plaintiff avers that in 1915 the city of Bismarck granted to one Frank Ployhar a franchise or license to use the streets of the city of Bismarck to serve gas to the city and the people therein for illuminating, light, and heating. The franchise was granted by ordinance, and Frank Ployhar made a written acceptance of the same. He agreed to accept all the provisions of the ordinance and to fully perform all of its obligations. He agreed to furnish gas of the quality prescribed by the ordinance at prices not to exceed the sums specified in the ordinance. Ployhar assigned his grant and contract to the plaintiff, and it at once proceeded to lay out and extend and construct its gas plant, and to charge the maximum rates. Now the company attempts to exact from its customers and the city a sum in excess of the maximum rates. Then an action was brought to restrain such exaction. Then the gas company obtained a writ to restrain the district court from proceeding in the action, on the ground that it had no jurisdiction.

The position of the plaintiff is that the limitations of its grant and the contract between its grantor and the city are void; that it has a right to use the grant and disregard the limitations, and the city has no remedy by an appeal to the courts; that its remedy, if any, is by an appeal to the railroad commissioners under chap. 208, Laws 1915. It is the opinion of the writer, speaking for himself alone, that this act permits an appeal to the railroad commissioners to fix rates in cases of *municipally owned plants*. The fifth and last section of the act declares that its purpose is to place the regulation of rates under the control of the railroad commissioners, subject to the right of review by the courts. However, the first four sections of the act and all the

procedure for rate fixing relates entirely to "municipally owned plants." If the purpose of the act had been to give the railroad commissioners a general power to fix rates, then there was no occasion for using the limiting term "municipally owned plants." However that may be, it is certain this is not a rate fixing case, and hence chap. 208 has no application.

The questions are: Had the city power to grant the charter? Had the plaintiff and his grantor power to accept the grant and to make a special written contract to observe the conditions of the same? May the gas company accept the benefits of the grant and repudiate its obligations? There is no claim that either the plaintiff or its grantor were induced to accept the grant and its obligations by any fraud or deception, or that the terms and conditions of the grant as they existed at the time were in any way unfair or unjust. There is no averment or showing that the grant has not been a source of profit to the plaintiff; no claim that the city was under any obligation to grant the charter. And if the city was free to grant or refuse the charter, it must have been free to prescribe the terms and conditions of the same. And the gas company and the grantor must have been free to accept or to refuse the grant. There was no compulsion, but assuredly the company was not free to accept the grant and its benefits and to repudiate its conditions. The city must have a right to insist that the company shall observe the conditions or that the charter shall be forfeited. That is plain common sense. If the company insists on holding its grant and fails to observe its conditions, that is a gross wrong for which the city has a constitutional right to a remedy by due process of law.

The plaintiff cites several cases holding that the courts have no jurisdiction to fix rates, but the question presented is not one of rate fixing. The question is: May the gas company or any party accept a grant of a charter and avail itself of the benefits and repudiate its conditions and obligations? May it accept from the city a valuable charter, fixing a maximum rate for gas, and then turn around and charge twice the maximum rate? And in such a case shall we say the city may not invoke the courts to forfeit the charter or to enforce its conditions? Assuredly it is a familiar rule of law that a grant upon condition may be forfeited for a failure to observe its conditions.

But if the question presented be merely one of contract, then clearly

it was competent for the city in granting a franchise to protect itself and the people of the city by contracting for maximum rates. That is in accordance with a well-reasoned decision by Judge Amidon in a Moorhead case. He says: "Here there has been no reduction by the city of the franchise rates. It simply stands upon its contract and asks protection against the rates being raised by the company. The party changing the franchise rates is not the city, but the public utility company, and the city is only asking the court to compel the company to perform its contract and furnish gas at the rates for which the company has agreed to be bound by." He cites many authorities showing that neither at law nor in equity is a party relieved from a contract by reason of the fact that performance becomes unprofitable. He says of contracts free from mistake, fraud, or imposition, that parties must be left free to make their own contracts, and it is the duty of the courts to enforce them as made. And this applies to contracts between municipalities and public utility companies. While Judge Amidon cites many authorities to sustain his decision, which is manifestly sound and in accordance with elementary principles, there is no reason for magnifying this case by any review of the authorities. It turns upon plain elementary principles, as above stated. The alternative writ was improvidently issued, and the case must be dismissed, with costs.

GRACE, J. I concur in the result.

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**STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER,**  
Attorney General, Plaintiff, v. N. C. McDONALD, Defendant.

(170 N. W. 873.)

**Elections — mandamus — original jurisdiction of supreme court.**

1. The original jurisdiction of the supreme court may properly be invoked in a mandamus proceeding involving the right of possession of the office of superintendent of public instruction.

**Elections — public officers — surrender of office enforceable by mandamus.**

2. It is the duty of every public officer, at the expiration of his official relation, to surrender to his successor the property and insignia of the office which

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NOTE.—On original jurisdiction of court of last resort in mandamus cases, see notes in 58 L.R.A. 833, and 38 L.R.A.(N.S.) 1000.



the law commits to his custody. This duty is ministerial only, and its performance is enforceable by mandamus.

**Elections—certificate prima facie title to office—court will not go behind certificate.**

3. The certificate of election to the office in dispute and qualification thereunder is prima facie title to the office, and the courts will not in a mandamus proceeding to compel surrender of the office to the holder of the certificate of election go behind such certificate.

**Elections—in mandamus to get possession of office facts involving right to hold office not considered.**

4. In such mandamus proceeding, the prima facie title to the office cannot be defeated by averments of fact which involve the ultimate title to the office.

Opinion filed January 10, 1919.

Original proceeding by the state, on the relation of William Langer, Attorney General, for the issuance of writ of mandamus to compel the defendant, N. C. McDonald, to surrender the office of superintendent of public instruction to Minnie J. Nielsen.

Writ granted.

*William Langer*, Attorney General, and *Edw. B. Cox*, Assistant Attorney General, for relator.

*John Carmody*, *J. A. Hyland*, and *Edward S. Allen*, for respondent.

**PER CURIAM.** Application is made to this court for an original writ of mandamus to compel the defendant, N. C. McDonald, to turn over to one Minnie J. Nielsen the possession of the office of superintendent of public instruction of the state of North Dakota.

The controlling facts are undisputed. The defendant McDonald was elected to the office of superintendent of public instruction at the general election held in November, 1916. His term of office ended on January 5, 1919. The defendant and said Minnie J. Nielsen were opposing candidates for the office involved in this controversy at the election in November, 1918, with the result that said Minnie J. Nielsen received more votes than the defendant. On December 9, 1918, the state board of canvassers issued a certificate of election declaring said Minnie J. Nielsen to have been duly elected to the office of superintendent of public instruction of North Dakota. On January 6, 1919, she qualified by taking the oath of office and filing the bond provided by law, but the defendant refused to surrender the office.

The defendant contends:

1. That the case does not warrant the exercise of the original jurisdiction of this court;
2. That there is a plain, speedy, and adequate remedy by action in the nature of quo warranto, and hence mandamus will not lie;
3. That said Minnie J. Nielsen did not have or hold the educational certificate prescribed by the statute.

We will consider these propositions in the order stated.

(1) So far as the question of jurisdiction is concerned, the case falls squarely within the rule announced by this court in *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234. That decision, as well as the subsequent decisions of this court, not only sustains the right, but makes it the duty, of this court to exercise its original jurisdiction in the instant case. See also *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A. 1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583.

(2) The second point raised was elaborately discussed, and ruled against defendant's contention, in *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. In that case it was held that where an incumbent is holding over after the expiration of his term, and until a successor is elected and qualified, and has no other claim to the office, he is a mere intruder as against a candidate who holds the proper certificate of election and has qualified for the office in the manner and form prescribed by law. The rule announced in *State ex rel. Butler v. Callahan* is in harmony with the principles of justice and common sense, and meets with our entire approval.

"It is the duty of every public officer, at the expiration of his official relation, to surrender to his successor the property and insignia of the office which the law commits to his custody. This duty is ministerial merely, no matter on what officer it devolves, and at common law its performance is enforceable by mandamus. . . . The right of the incumbent of an office to hold over after the expiration of his term exists only in cases where there is no legally elected and qualified successor, and therefore when there is a duly elected and qualified successor, the incumbent can have no such color or claim of right to the office as will prevent mandamus from issuing to compel him to surrender the insignia, etc., of the office. . . . The commission or certificate of election to the office in dispute and qualification thereunder is prima

facie title to the office, and the courts will not in a mandamus proceeding to compel the surrender of the office to the holder go behind the commission or certificate." 18 R. C. L. pp. 261, 262, § 186. See also § 8457, Compiled Laws 1913; State ex rel. Moore v. Archibald, supra; Chandler v. Starling, 19 N. D. 144, 122 N. W. 198. "A prima facie right or title on the part of the relator to the office is all that is necessary, or in fact involved, in mandamus proceedings to compel the surrender of insignia, etc., of the office." 18 R. C. L. p. 263, § 188.

(3) The third point was specifically ruled against defendant's contention in State ex rel. Butler v. Callahan, supra. That case involved the office of county superintendent. The defendant in his answer admitted that the relator had received a certificate of election, and had qualified thereunder by taking the oath of office and giving the required bond; but averred, as new matter, that the relator did not have or hold the educational certificate prescribed by the statute. The court ruled that such new matter did not constitute a defense; that the new matter in the answer had reference only to the relator's ultimate title to the office; and that such title could not be litigated in a mandamus proceeding. The court further held that in such mandamus proceeding "the relator cannot be driven out of court by the mere fact that the incumbent pleads facts in his answer which call for a determination of the relator's ultimate title to the office, and only that title."

"When a commission or certificate of election has been issued to another, who has qualified thereunder, it is the duty of an incumbent of a public office, at the expiration of his term, to surrender the office to his successor; and should he then desire to contest the eligibility, election, or qualification of the person so holding the commission or certificate, he may do so by proceeding in the manner prescribed by law for determining contested claims to office, but he cannot do so in mandamus proceedings to compel the surrender of the office." 18 R. C. L. p. 263, § 189.

It follows from what has been said that a writ of mandamus must issue as prayed for. It is so ordered.

BRONSON, J., deeming himself disqualified, did not participate, Honorable W. L. Nuessle, Judge of Sixth Judicial District, sitting in his stead.

NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation, Respondent, v. A. MARTIN, Appellant.

(170 N. W. 880.)

**Appeal and error — notice of entry of judgment — time limit of appeal.**

1. Proper notice of the entry of a judgment is given by the service of a copy of the findings and order for judgment, the judgment, taxation of costs, and notice of the retaxation thereof, so as to start running the statutory time within which an appeal may be made.

**Time for appeal — jurisdiction — dismissal.**

2. An appeal taken from a judgment, more than six months after notice of the entry of such judgment has been served, confers no jurisdiction in this court to consider the same except for purposes of dismissal.

Appeal from District Court of Rolette County, *Buttz, J.*

Action upon a policy of fire insurance; appeal from judgment rendered against the defendant; motion to dismiss the appeal by respondent.

Motion granted; appeal dismissed.

*Flynn & Traynor*, for appellant.

Unless notice of entry of judgment is served upon the proper parties the statute does not run against the time for appeal. *Comp. Laws 1913, § 7678; Prescott v. Brooks, 11 N. D. 93; First Nat. Bank v. McCarthy (S. D.) 83 N. W. 423; Mallory v. See (Cal.) 61 Pac. 1123; Clark Imp. Co. v. Wadden (S. D.) 136 N. W. 111.*

*Fred E. Harris*, for respondent.

If no appeal is taken within six months after notice of entry of judgment, court loses jurisdiction both of the person and of the subject-matter of the action. *Comp. Laws 1913, § 7820; Keogh v. Snow (N. D.) 83 N. W. 864; Barnett v. Will (N. D.) 166 N. W. 511.*

Actual notice of the entry of judgment is sufficient. *Brooks v. Bigelow (S. D.) 68 N. W. 286; Braeley v. Marks (Wash.) 43 Pac. 27.*

Even when both parties have asked for a directed verdict, and the court takes the case away from the jury, it will still be vested as a case triable by jury on appeal. *Comp. Laws 1913, § 7846; Laffay v. Gordon, 15 N. D. 282, 107 N. W. 969; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566; Barnum v. Gorham Land Co. 13 N. D. 359, 100 N. W. 1079; American Case & Register Co. v. Boyd, 22 N. D.*

166, 133 N. W. 65; *First M. E. Church v. Gadden*, 8 N. D. 162, 77 N. W. 615; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938.

In the absence of any statutory provisions, or provisions in the charter of a corporation, limiting the method by which a company may bind itself by contract, an oral or parol contract of insurance is valid. *Brown v. Franklin Mut. F. Ins. Co. (Mass.)* 43 N. E. 512; *Baker v. Westchester F. Ins. Co. (Mass.)* 38 N. E. 1124; 19 Cyc. 600; *Goodhue v. Hartford F. Ins. Co. (Mass.)* 55 N. E. 1039; *Insurance Co. of N. A. v. Bird (Ill.)* 51 N. E. 686; *Firemen's Ins. Co. v. Kuessner (Ill.)* 45 N. E. 540; *Stoeckle v. Hahn (Ill.)* 42 N. E. 150; *Sanford v. Orient Ins. Co. (Mass.)* 54 N. E. 883; *Newark Mach. Co. v. Kenton Ins. Co. (Ohio)* 35 N. E. 1050; *Phoenix Ins. Co. v. Ireland (Kan.)* 58 Pac. 1024; *Hardwick v. State Ins. Co. (Or.)* 26 Pac. 840; *Stehlick v. Mechanics Ins. Co. (Wis.)* 58 N. W. 379; *Revere F. Ins. Co. v. Chamberlain*, 18 N. W. 338; *Zell v. Herman F. Ins. Co. (Wis.)* 44 N. W. 828; *King v. Hekla F. Ins. Co.* 14 N. W. 297; *Salisbury v. Hekla F. Ins. Co. (Minn.)* 21 N. W. 552; *Dibble v. Northern Assur. Co. (Mich.)* 37 N. W. 704; *Campbell v. American F. Ins. Co. (Wis.)* 40 N. W. 661.

BRONSON, J. This is an appeal from a judgment in the district court of Rolette county rendered June 28, 1917, against the defendant for \$624.95.

Thereafter on March 12, 1918, the trial court made an order reducing such judgment in the sum of \$140.40, permitting the balance of the judgment to stand and the lien thereof as of June 28, 1917.

The appeal herein was made on the 17th day of June, 1918.

The respondent has made a motion to dismiss the appeal for lack of jurisdiction, through failure to appeal within the statutory time prescribed.

On June 28, 1917, the attorney for the respondent mailed to the appellant a copy of the findings of fact, conclusions of law, order for judgment, the judgment, statement of judgment and costs, and notice of retaxation of costs; and in response the attorney for respondent received from the appellant on July 2, 1917, a letter referring to the findings of fact and conclusions by which judgment was awarded against him, and stating that he intended to appeal such case.

The appellant contends that no written notice was given of the entry

of such judgment as required by §§ 7678 and 7820, Compiled Laws 1913.

The simple questions involved are: (1) Was proper notice given of the entry of such judgment so as to put in operation the statutory provisions concerning the time in which an appeal must be made? (2) Was the appeal herein made within six months after such notice was served?

In the case of *Keogh v. Snow*, 9 N. D. 458, 83 N. W. 864, this court held that an order denying a motion to vacate a judgment, served upon the appellant by copy, constituted written notice of the order.

Upon the same reasoning, the service of a true and correct copy of the judgment entered and the other papers above enumerated is a compliance with the requirements of §§ 7678 and 7820, Compiled Laws 1913.

The judgment as modified dated from June 28, 1917, in accordance with the specific order of the trial court.

The statute which limits the time for an appeal is mandatory and jurisdictional. *Stierlen v. Stierlen*, 8 N. D. 297, 78 N. W. 990.

The appeal, therefore, was taken too late to confer any jurisdiction upon this court to consider the same, except for purposes of dismissal. *Barnett v. Will*, 39 N. D. 51, 166 N. W. 511; *Comp. Laws 1913, § 7820*.

The appeal is dismissed, with costs to appellant.

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T. G. C. KENNELLY, Administrator of the Estate of Luigi Nardella, Deceased, Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

(170 N. W. 868.)

**Depositions — exceptions to — order suppressing not appealable.**

1. An order sustaining exceptions to and suppressing a deposition is not appealable.

**Depositions — appeal from order suppressing — dismissal by court on its own motion.**

2. Where it clearly appears that an order is not appealable, the court will dismiss the appeal on its own motion, whether the point is raised by the appellee or not.

Opinion filed December 26, 1918. Rehearing denied January 14, 1919.

Appeal from the District Court of Morton County, *W. C. Crawford*, Special Judge.

Plaintiff appeals from an order sustaining exceptions to, and suppressing, a deposition.

*Jacobsen & Murray*, for appellant.

Notwithstanding the language of the statute is mandatory, the statute is one regulating civil procedure, and is construed to be directory only. *Patrick v. Nurnberg*, 21 N. D. 380.

The defendant failed to make any showing that it was prejudiced by reason of the failure of the signature of the witness. This is essential in order to suppress depositions. *Patrick v. Nurnberg*, 21 N. D. 382.

The failure of a witness to sign or subscribe his depositions after reduced to writing is no ground for rejection, where the witness has been duly sworn, or the commissioner so certifies. 13 Cyc. 939 and cases cited in No. 33; *Rutherford v. Nelson*, 2 N. C. 105; *Mobley v. Hamit*, 1 A. K. Marsh, 590; *Moulson v. Hargrove*, 1 Serg. & R. 201; *Murphy v. Work*, 2 N. C. 105; *Brinkley v. Bell* (Ga.) 62 S. E. 67.

*Watson, Young & Conmy*, for respondent.

Where the deposition was not signed as required by statute it should be suppressed. *Wilson v. Campbell*, 70 Am. Dec. 586; *Avery v. Avery*, 62 Am. Dec. 513; *Knickerbocker v. Gray*, 72 N. E. 869; *Reading v. Weston*, 18 Am. Dec. 89.

A settlement with an unauthorized administrator does not protect creditors from action by proper party. 150 N. W. 385, 241 U. S. 211.

Depositions in foreign countries can be taken only before any consular officer, vice consul, or secretary of a legation. 8 R. C. L. § 17, Depositions; U. S. Comp. Stat. §§ 3185 & 3211.

CHRISTIANSON, Ch. J. The defendant filed exceptions in writing to a certain deposition taken by the plaintiff. The questions arising on such exceptions came on to be heard before the court before the commencement of the trial, upon the motion of plaintiff's attorneys. The court sustained the exceptions and plaintiff appeals.

In our opinion no appeal lies from the ruling or order in question. The right of appeal depends on the statute; and under our statute an appeal may be taken to this court from the following orders only:

"1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

"3. When an order grants, refuses, continues or modifies a provisional remedy, or grants, refuses, modifies or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of § 8074 of this Code; when it sets aside or dismisses a writ of attachment for irregularity; when it grants, or refuses a new trial or when it sustains or overrules a demurrer.

"4. When it involves the merits of an action or some part thereof; when it orders judgment on application therefor on account of the frivolousness of a demurrer, answer or reply on account of the frivolousness thereof.

"5. Orders made by the district court or judge thereof without notice are not appealable; but orders made by the district court after a hearing is had upon notice which vacate or refuse to set aside orders previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice." Comp. Laws 1913, § 7841.

It seems entirely clear that the classes of order sought to be reviewed on this appeal do not fall within any of the orders enumerated. It is in effect merely a ruling upon evidence. Such rulings or orders are not appealable. See *Hulett v. Matteson*, 12 Minn. 349, Gil. 227; *State v. Arns*, 72 Iowa, 555, 34 N. W. 329; *Neacy v. Thomas*, 148 Wis. 91, 133 N. W. 580; *Richards v. Burden*, 31 Iowa, 305. It is true the respondent has not moved to dismiss the appeal. But it is equally true that where it clearly appears "that the appellant has no right of appeal in the given case, the court will dismiss the appeal on its own motion, whether the point is raised by counsel for the appellee or not." 2 Enc. Pl. & Pr. 338, 339; 4 C. J. 589-592.

While the question is not necessarily involved, we deem it proper to say that we believe that if the order appealed from was subject to review on this appeal, it should be affirmed. The instant action is one for



damages for the death of Luigi Nardella. The deposition suppressed purports to be the deposition of the widow of the deceased. We have before us on this appeal the exceptions, the affidavit of defendant's attorney tendered in support of the exceptions, the deposition, and the order of the court suppressing the deposition. The answers in the deposition are all in the Italian language. In the order suppressing the deposition, the court states that he called an interpreter who could read and interpret the Italian language; and that such interpreter advised the court that he could not find that the deposition was signed; and that he could not find it stated anywhere in the deposition that the witness was illiterate and unable to sign her name thereto; and that he could not find that the deposition was properly certified to by the officer that took it; and could not find what officer did take it. So far as the statement that the witness did not sign the deposition is concerned, this does not rest alone on the statement in the court's order. The deposition itself is before us, and an inspection clearly shows that it is not signed by the witness.

It is stated in the defendant's affidavit "that it was impossible to find someone in Italy who would or could attend the taking of this deposition in its behalf; there being no time to communicate and tell them what the lawsuit was about and what examination of the witnesses should be made." It is further averred in the affidavit that the Italian consul located at Denver, Colorado, has communicated with the defendant and claims to be authorized by the widow of the deceased to act in her behalf in the administration of the estate of said deceased, and to take all steps necessary to liquidate any claims she may have against the defendant railway company by reason of the death of her husband.

Section 7899, Compiled Laws 1913, provides: "The deposition must be written by the officer, or in his presence by the witness, or some disinterested person; *and must be subscribed by the witness.*"

Appellant contends that this statute, notwithstanding its mandatory language, is only directory, and cites *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W. 254, in support of this contention. The question of the necessity of the signing of a deposition by the witness was not involved in the *Nurnberg Case*. It will be noted that the *Nurnberg Case* cites *Cyc.* and the *Encyclopedia of Evidence*. Both of these

authorities deal with the question whether an unsigned deposition is admissible in evidence.

Cyc. says: "The failure of the witness to sign or subscribe his deposition after its reduction to writing requires its rejection. Under some circumstances, however, . . . the deposition may be admitted although not signed." 13 Cyc. 939. And the Encyclopedia of Evidence, says: "The witness should sign his deposition [and the court may compel him to do so]. Unsigned depositions have usually been rejected. But, on the other hand, there are numerous precedents, especially in equity, *and in the absence of positive statutes*, of the admission in evidence of depositions not signed by the witnesses, but properly certified by the examining officers." 4 Enc. Ev. 432. See also 7 Standard Proc. 326.

Inasmuch as a determination of the question is in no manner involved in this case, we refrain from expressing any opinion as to whether under any, and if so under what, circumstances an unsigned deposition may be admitted in evidence in this state.

Appeal dismissed.

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ERICK ABELSTAD, Respondent, v. SWAN A. JOHNSON, Appellant.

(170 N. W. 619.)

**Master and servant—master's duty—safe place to work.**

1. In an action for personal injuries sustained by a pusher in a lignite coal mine, it is the duty of the master to furnish reasonably safe appliances and a reasonably safe place where the employee is instructed to be and work.

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NOTE.—Authorities discussing the question of servant's assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, are collated in a note in 28 L.R.A.(N.S.) 1250, in which it appears that the rule most frequently given is that a servant assumes the risk if the dangerous conditions are known, or would be known if he had exercised ordinary care.

On duty of master to furnish servant with safe means and appliances with which to work, and generally to provide for their safety, see note in 92 Am. Dec. 313.

**Master and servant—working in dangerous place under master's instructions—assumption of risk—contributory negligence.**

2. An employee, in working behind a coal car loaded with clay as the same is being drawn up an incline and watching the same pursuant to instructions given by the master, and then in a place of danger, if the cable should break, is not necessarily guilty of contributory negligence, and does not necessarily assume the risk as a matter of law.

**Question for jury—negligence.**

3. Under the evidence *held* that the trial court properly submitted to the jury the questions of defendant's negligence and of plaintiff's contributory negligence and assumption of risk.

Opinion filed December 26, 1918. Rehearing denied January 15, 1919.

Appeal from the District Court of McLean County, *Nuessle, J.* Action for personal injuries; appeal from judgment rendered for plaintiff and from order of trial court denying motion for judgment *non obstante*.

Affirmed.

*R. L. Fraser* and *J. A. Hyland*, for appellant.

If the employee having an opportunity of acting in any one of two or more ways, one of which is less safe than another, and knowingly chooses the less safe mode, he is deemed negligent and disentitled to recover, although the employer may also have been negligent. *German Lumber Co. v. Hannah*, 60 Fla. 70; *Schantz v. Eckhardt Mfg. Co.* 112 La. 568; *Bolton v. Jamar*, 93 Ind. 404; *Hurst v. Railway*, 163 Mo. 309; *Cleveland R. Co. v. Workman*, 66 Ohio St. 509; *Hatton v. Lumber Co.* 39 Wash. 323; *New York, C. & St. L. R. Co. v. Hamlin*, 170 Ind. 20.

A servant with knowledge of existing perils, gained through observation, or from a long continuance in business, is bound to make use of such knowledge and look out for such dangers as experience has taught him is liable to produce injury. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Pennsylvania Co. v. Finney*, 145 Ind. 551, 558, 42 N. E. 816; *New York, etc., R. Co. v. Ostrum*, 146 Ind. 452, 45 N. E. 651.

The right to recovery is barred, if it appears that the employee has as much knowledge as, or equal means of information with, the employ-

er. *Priestly v. Fowler*, 3 Mees. & W. 1, 7 L. J. Exch. N. S. 42, 19 Eng. Rul. Cas. 102; 26 Cyc. 1170.

A master is not bound to warn and instruct his servant as to dangers which are patent and obvious. 26 Cyc. 1171.

The master has the right to assume that an experienced servant of mature years is possessed of ordinary mental faculties, the usual powers of observation, and such knowledge as is acquired by common experience. *Creighton v. Keens* (Neb.) 149 N. W. 403; *Illinois Cr. Co. v. Swift*, 213 Ill. 307, 72 N. E. 737.

It is well settled that where a servant knowingly selects a more dangerous way to couple or uncouple cars when there is a comparatively safe way which he knows, or ought to know, and which he may choose, and he is thereby injured, he is guilty of contributory negligence and cannot recover. *United States*.—*Morris v. Duluth etc. R. Co.* 47 C. C. A. 664, 108 Fed. 749; *Gilbert v. Chicago etc. R. Co.* 123 Fed. 832, affirmed in 63 C. C. A. 27, 128 Fed. 529; *Louisville etc. R. Co. v. Ward*, 10 C. C. A. 166, 18 U. S. App. 683, 61 Fed. 927; *Herrick v. Quinley*, 41 C. C. A. 294, 101 Fed. 187; *Illinois*.—*Chicago etc. R. Co. v. Rush*, 84 Ill. 570; *Ohio etc. R. Co. v. Bass*, 36 Ill. App. 126; *Peoria etc. R. Co. v. Puckett*, 42 Ill. App. 642, 52 Ill. App. 226; *Minnesota*.—*Chittick v. Minneapolis etc. R. Co.* 88 Minn. 11, 92 N. W. 462; *Montana*.—*Thompson v. Montana C. R. Co.* 17 Mont. 426, 43 Pac. 496.

*H. F. O'Hare* and *E. T. Burke*, for respondent.

The servant is bound to keep his eyes open, and use the caution of a prudent man, but he need not inspect appliances and premises to determine whether they are safe. *Umstad v. Colgate Elevator Co.* 18 N. D. 309.

BRONSON, J. This is an action for personal injuries. The plaintiff was injured on October 20, 1917, in a lignite coal mine near Garrison, North Dakota, owned and operated by the appellant. In the trial court, the jury rendered a verdict for the plaintiff for \$3,000, and upon the judgment entered thereupon and the order of the trial court denying appellant's motion for judgment *non obstante* this appeal is prosecuted.

In the specifications of error the appellant challenges the sufficiency  
41 N. D.—26.

of the evidence to justify the verdict, and contends that the evidence discloses that the plaintiff was guilty of contributory negligence: First, in overloading the car contrary to the instructions of the master; second, in sitting on the rail back of the car while the car was being hoisted up the incline; third, in continuing to work and in voluntarily placing himself in danger when he knew or should have known the condition of the cable.

It is, of course, elemental that questions of contributory negligence and of assumption of the risk are ordinarily for the jury, and that unless it appears from the evidence that reasonable men, acting prudently, could draw only one conclusion therefrom, this court will not disturb the findings of the jury thereupon. *Messenger v. Valley City Street & Interurban R. Co.* 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023.

There is evidence in this case of probative force to show that the plaintiff, aged twenty-seven years, entered the employment of the appellant October 25, 1917, as pusher in his lignite coal mine. That his duty consisted of pushing out cars of lignite coal that had been mined by the miners therein, and of loading cars with clay to be removed from such mine, and in attaching such loaded cars to a cable preparatory to the same being hauled up an incline to the unloading place at the entrance of the mine; theretofore the plaintiff had been employed in such coal mine in the years 1915 and 1916 with similar duties. That in 1916, when the plaintiff was working in such mine, the appellant instructed the plaintiff to watch these cars, and, if the same went off the track while being hauled up, to ring the bell, in order to stop the team so hauling the same up the incline. On October 27, 1917, the plaintiff had pushed out a car loaded with clay to the place where the cable was usually affixed to such car. That morning another person, down in the mine, assisting, fastened the cable to the car and rang the bell. The plaintiff stood back of the car some 4 or 5 feet, and as it started up the incline he squatted on his haunches to see that the car kept on the track, and, if it did not, to ring the bell. As the car proceeded up the incline the cable broke suddenly at the place where it was hooked on the car and the car ran down the incline; the plaintiff started to run toward some switches in the opposite direction into the mine, stumbled and fell. The car came upon and ran over him, injuring

him to such an extent that the amputation of his leg was necessary. The plaintiff was told by the appellant not to load with clay the cars, as full as he did with coal, for the reason that clay was heavier. The testimony concerning the extent to which the car was loaded with clay varies from over half full to overflowing. The plaintiff testifies that he followed the instructions of the appellant and did not load such car as full as it was loaded with coal. There is evidence in the record that the cable in question was worn; that the appellant knew its condition and had ordered a new cable, and that it was badly worn at this place where the loop was formed that connected such cable with the car.

There is also evidence in the record that the car ran off the track frequently, and it is not disputed that the plaintiff was told by the appellant to watch the car and ring the bell when it ran off the track. But the appellant claims that right near this place where the cable is hooked to the car in question there is a manhole or place of safety which the plaintiff knew and which he could and should have used; that from this place he could view the car as it proceeded up the incline and ring the bell in case it left the track; also that the plaintiff knew or ought to have known of the condition of this cable, and that he voluntarily placed himself in a position of danger unnecessarily and contrary to instructions given. The plaintiff's testimony, however, denies knowledge of the condition of the cable; that he did not know about the manhole, that he had not been given instructions concerning the same, and that he took this squatting position behind the car in order to be able to watch the car as it proceeded up the incline. At the time the plaintiff had on a miner's lamp, and the place where he worked was not very light except such as was received from this lamp or came in from the entrance way distant.

Under this evidence this court cannot say as a matter of law that the plaintiff either assumed the risk or was guilty of contributory negligence in taking the position that he did on the day of the accident for the purposes that he has explained in his testimony. Under the evidence we are satisfied that this was fairly a question for submission to the jury, and that their findings upon such evidence should not be disturbed. The trial court committed no error in submitting the question of defendant's negligence to the jury.

It was the duty of the master to furnish reasonably safe appliances

and a reasonably safe place for him to work, and the servant had the right to assume that the master had fulfilled his duty. On the other hand, the master was not required to instruct or protect the servant against obvious known and necessary dangers, where the servant had opportunity to understand and perceive the same; and it was the duty of the servant to use reasonable care to inform himself of these hazards to which he may be exposed, but he was not under duty to inspect the premises and appliances to determine whether they were safe.

The fact that the servant had as good an opportunity as the master to observe and know of the existing defective appliances involving danger to him did not necessarily charge him as a matter of law with assumption of the risks involved or with contributory negligence. *Umsted v. Colgate Farmers Elevator Co.* 18 N. D. 309, 122 N. W. 390; *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183; *Scheurer v. Banner Rubber Co.* 227 Mo. 347, 28 L.R.A.(N.S.) 1207, 1215, 126 S. W. 1037, 21 Ann. Cas. 1110.

The judgment of the trial court is affirmed.

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**MATILDA BERGERSON, Respondent, v. OLE MATTERN, as Administrator of the Estate of Carrie Mattern, Deceased, Appellant.**

(170 N. W. 877.)

**Parent and child — services — implied contract.**

Although the usual presumption is that services rendered by a child to its parent are gratuitous, in the absence of an express contract therefor, nevertheless, where the circumstances are exceptional and the character of the services rendered peculiar, a contract may be implied to pay for such services.

Opinion filed December 31, 1918. Rehearing denied January 25, 1919.

Action for services. From judgment entered and order denying judgment *non obstante*, District Court of Renville County, K. E. Leighton, J., defendant appeals.

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NOTE.—Authorities passing on the question of implication of agreement to pay for services rendered by child to parent are collated in a note in 11 L.R.A.(N.S.) 873.

**Affirmed.**

*Sinkler & Bryans*, for appellant.

There can be no recovery for services rendered a parent in the absence of an expressed promise or contract. 18 Cyc. 412; 11 R. C. L. § 233, p. 208; 153 Mich. 206, 126 Am. St. Rep. 479; Zimmerman v. Zimmerman, 129 Pa. 229, 15 Am. St. Rep. 720; Taylor v. Thieman, 132 Wis. 38, 122 Am. St. Rep. 943; Williams v. Williams, 114 Wis. 79, 89 N. W. 835; Hodge v. Hodge, 11 L.R.A.(N.S.) 873, 91 Pac. 764; Allen v. Allen, 60 Mich. 635, 27 N. W. 702; Lynn v. Lynn, 29 Pa. 369; Fritchard v. Fritchard, 69 Wis. 373, 34 N. W. 506; Wessinger v. Roberts, 45 S. E. 169; 67 Cyc. 204; Seavey v. Seavey, 37 N. H. 125; Cummings v. Cummings, 8 Watts, 366; Cannon v. Windsor, 1 Houst. (Del.) 143; Dance v. Magruder, 26 Ky. L. Rep. 220, 80 S. W. 1120; Young's Estate, 148 Pa. 573, 24 Atl. 124; Enoch's Estate, 3 Phila. 147; Borum v. Bell, 132 Ala. 86, 31 So. 454; Walker v. Taylor, 28 Colo. 233, 64 Pac. 192; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182; Terry v. Warder, 25 Ky. L. Rep. 1486, 78 S. W. 154; Re Pfohl, 20 Misc. 627, 46 N. Y. Supp. 1086; Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999; Endrus v. Fosten, 17 Vt. 556; Jackson v. Jackson, 96 Va. 165, 31 S. E. 78.

The presumption of law where services such as board and lodging are rendered to the immediate members of the claimant's family is that such were meant to be gratuitous. Harper v. Davis, 115 Md. 349, 80 Atl. 1012; Squire v. Root (Iowa) 50 N. W. 706; Disbrow v. Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678, and note; Key v. Harris, 116 Tenn. 161, 92 S. W. 235, 8 Ann. Cas. and note 200; Seaman v. Jameson, 158 App. Div. 832, 144 N. Y. Supp. 209; Hyle v. Smith (Miss.) 74 So. 611; Beneke v. Beneke, 119 Minn. 441, 130 N. W. 689; Hardimans v. Crick, 133 Am. St. Rep. 248.

*Ryerson & Rodsater*, for respondent.

Where the family relationship exists and the services are of such a nature as to lead to a reasonable belief that it was the understanding of the parties that a pecuniary compensation should be made for them, the jury should find an implied promise and a *quantum meruit*. Guild v. Guild, 15 Pick. 129; Spring v. Julett, 104 Mass. 591; Thurston v. Perry, 130 Mass. 240; Re Bryant, 73 Vt. 240; Williams v. Barnes, 14 N. C. 93 (3 Dev. L.) 348; Saunders v. Saunders, 90 Me. 284;



Harshberger v. Stansberry, 20 W. Va. 23, 11 L.R.A.(N.S.) 874, *et seq*; McGarvey v. Roods, 35 N. W. 488; Marietta v. Marietta (Iowa) 57 N. W. 708; Mark v. Boardman (Ky.) 1 L.R.A.(N.S.) 819.

BRONSON, J. This is an action to recover for services rendered by the daughter to her mother during her last illness. In the trial court a verdict was returned by the jury for \$1,750, and from the judgment entered thereupon and from the order of the trial court denying a motion for judgment *non obstante*, the defendant has appealed.

In substance, the record discloses the following facts: The plaintiff, a married woman, at her home for a period of two years and four months furnished her mother, who at the time of her death was aged eighty years, with exceptional nursing and care. The mother was paralyzed, practically helpless, did not respond to nature's calls, and needed the care and attention of an infant. She first came to live with her daughter in the year 1908; she remained there for some two years, and then went to South Dakota for some nine months, on a visit, thereafter returning to the home of the plaintiff in 1911, where she stayed until her death. On July 25, 1913, she became paralyzed, and for some two weeks until September 5, 1913, a nurse was secured for her. Thereafter, and until her death, she received the sole care and attention of her daughter.

The record amply discloses that the services performed were not only devoted and filial, but also burdensome, menial, and loathsome. The character of such services rendered showed high and efficient nursing. No express contract by the mother to pay for these services is shown. The evidence discloses the reasonable value thereof.

Although the usual presumption is that services rendered by a child to its parent are acts of kindness and gratuitous, and do not create by their rendition an implied promise to pay therefor, nevertheless, where the services rendered are so exceptional and peculiar, and the surrounding circumstances such as to lead to the reasonable belief of an understanding that pecuniary compensation should be made, a contract to pay therefor may be implied. Note in 11 L.R.A.(N.S.) 873, 879; 11 R. C. L. § 233; 18 Cyc. 412; 29 Cyc. 1620; Marietta v. Marietta, 90 Iowa, 201, 57 N. W. 708; Mark v. Boardman, 28 Ky. L. Rep. 455, 1 L.R.A.(N.S.) 819, 89 S. W. 481.

We are satisfied that the record presents evidence upon which an implied contract may so be found. The judgment of the trial court is affirmed.

GRACE, J., being disqualified, did not participate, Honorable W. L. NUESSELE, Judge of Sixth Judicial District, sitting in his stead.

ROBINSON, J. (concurring specially). In this case it appears that during two years and four months, commencing on September 5, 1913, Carrie Mattern, deceased, the mother of plaintiff, was paralyzed and unable to care for herself, and had to receive all the care of an infant until she died at the age of eighty years. During all of that time the plaintiff furnished her aged mother board, lodging, nursing, and the best of care, lifted her from the bed to a chair and from the chair to the bed, fed her like an infant, furnished her with clean diapers.

Most of the time when the mother was not able to sit up in a chair or to leave the bed, she received the greatest care, and, on an examination after her death, the doctor found on her body only one small sore and testified that her appearance showed great care. For such care and nursing the plaintiff presented a claim against the estate for \$2,000, and the jury found a verdict for \$1,750, on which judgment was rendered, and the administrator appeals.

There is no proof of an express contract to pay for the care and nursing, and it is contended that the law does not imply a contract. Of course the general rule is that a child is always welcome to the home of the parent and a parent to the home of the child, and for any ordinary care and hospitality neither one ever thinks of making a charge against the other; and in such a case the law does not imply a contract. Custom makes the law. Reason is the soul of the law, and when the reason of the law ceases, so does the law itself.

The services rendered by the plaintiff were menial, tiresome, sickening, loathsome, so that a regular nurse would have charged from \$15 to \$25 a day. Certain it is that the sum allowed the plaintiff was no just compensation for her services, and no person of a just mind and memory would think of receiving such services without compensation. Hence, it was proper for the jury to assume that the deceased promised to pay or intended to pay for the services, unless it appears that she

was void of mind and memory reduced to the state of an infant or an idiot. The claim is for absolute necessities for which the estate of an infant or an idiot would be liable, regardless of any contract.

"A person entirely without understanding has no power to make a contract of any kind, but is liable for the reasonable value of things furnished to him necessary for his support." Comp. Laws, § 4343. Under this statute, if the deceased had no understanding, then her estate is liable for the necessities furnished; if she had understanding, then the law presumes she agreed to pay for the necessities what the same was reasonably worth. In either event, the verdict and judgment is just and righteous, and the same is commended and affirmed.

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ROBERT R. FROEMKE and Herman A. Froemke, Plaintiffs and Respondents, and PETER OLSON and Ingebor Sunby, Interveners and Respondents, v. W. S. PARKER and L. Altman, Defendants and Appellants.

(171 N. W. 284.)

**Water and watercourses—sloughs not treated as surface waters.**

1. The waters of a slough that has existed for over thirty-five years, with waters remaining therein almost constantly, in extent covering 40 acres, more or less, being a natural depression for the reception of the surface waters of the tributary adjacent watershed for which there is no natural outlet, are not to be treated as surface waters, even though the supply thereof is exclusively from surface waters.

**Watercourse—what constitutes—sloughs cannot be drained at expense of lower landowners.**

2. A runway or draw, naturally serving to drain off the surface waters of a tributary watershed occasioned by the winter's snow or the spring rains, serving this purpose only temporarily, though periodically, otherwise used and being capable of use for agricultural purposes, is not a watercourse.

**Waters and watercourses—lower landowner cannot complain of the reception of surface waters in natural drainway.**

3. Such draw or runway is simply a natural drainway for the surface waters of the watershed that it serves. The lower landowner over whose land such

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NOTE.—On right to hasten flow of surface water along natural drainways, see notes in 19 L.R.A.(N.S.) 167, and L.R.A.1916F, 427.

As to what is surface water, see note in 25 L.R.A. 527.

natural drainway exists has no legal ground of complaint to the reception of the surface waters in such drainway from the tributary watershed as they were accustomed to come in a state of nature.

**Artificial drainage—may be stopped by injunction.**

4. Where the owner of the land upon which such slough is located has constructed a tile drain from such slough to such drainway some 1,800 feet in length, the purpose and effect of which is to drain off the waters therein upon and through such drainway to the damages of the lower landowners, no legal right exists so to do, and injunction will lie to prevent the maintenance of such tile drain.

**Neither civil nor common enemy rule applies.**

5. *Held*, under the facts, that there is no question presented for the application of either the civil law rule or the common enemy rule concerning surface waters.

Opinion filed January 30, 1919.

Appeal from District Court, Ransom County, *Allen, J.*

Action to enjoin discharge of waters.

From a judgment entered for plaintiffs and interveners, defendants appeal.

Affirmed.

*Kvello & Adams*, for defendants and appellants.

The case of *Soules v. N. P. R. Co.* 34 N. D. 7, 157 N. W. 823, states the two rules as to surface water. See *Hannaher v. St. Paul, etc., R. Co.* 5 Dak. 1, 37 N. W. 717; *Carroll v. Rye Twp.*, 13 N. D. 458, 101 N. W. 894; 40 Cyc. p. 639, where the text defines surface waters; *Brandenberg v. Zeigler*, 62 S. C. 18, 89 Am. St. Rep. 887; *Sheenan v. Flynn*, 59 Minn. 436, 161 N. W. 462; *Thompson v. Andrews*, 165 N. W. 9; *Mischler v. Peterson*, 166 N. W. 640.

A watercourse entitled to the protection of the law is constituted if there is sufficient natural and accustomed flow of water to form a distinct and definite channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. *Soules v. N. P. R. Co.* 34 N. D. 7; *Riechert v. N. P. R. Co.* 167 N. W. 127; 40 Cyc. 553.

"To constitute a natural course, it is not necessary that the flow of water be sufficient to wear out a channel having well-marked sides and banks, but if the surface water uniformly or habitually flows over a given course having reasonable limitations as to width the line of the

flow is a watercourse." For further definition see *Lambert v. Alcorn* (Ill.) 33 N. E. 53; *Rubordy v. Murray* (Ill.) 52 N. E. 325; *Quinn v. C. M. St. P. R. (S. D.)* 120 N. W. 884; *Thompson v. Andrews* (S. D.) 165 N. W. 7; *Mishler v. Peterson* (S. D.) 166 N. W. 645.

*Pierce, Tenneson, & Cupler*, for plaintiffs, interveners and respondents.

The lower proprietor has no right to obstruct the runway, and is liable for the resulting injury to the upper proprietor from such act. *Soules v. Northern P. R. Co.* 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823.

Followed in *McHenry County v. Brady*, 37 N. D. 59, 163 N. W. 540; *Quinn v. C. M. & St. P. R. Co.* 22 L.R.A.(N.S.) 789, and note, 30 Am. & Eng. Enc. Law, 323 to 324.

The test to determine whether water is "surface water" is not that it is caused by or comes from snow and rain, because many creeks, streams, and other watercourses have their only source of supply from rain and snow. *McKinley v. Union County*, 29 N. J. Eq. 171; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Cario v. Brevart*, 25 L.R.A. 527, and note; *Roit v. Furrow*, 6 L.R.A.(N.S.) 157.

Even surface water cannot be cast upon the servient or lower estate by artificial means. Note to *Mizell v. McGowan*, 85 Am. St. Rep. 726; *Farnham, Waters*, § 885, pp. 2574, 2575; *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Davis v. Lond Green*, 8 Neb. 43; *Wendlandt v. Cavanaugh* (Wis.) 55 N. W. 408; *North Point v. Utah*, 40 L.R.A. 851, 67 Am. St. Rep. 607, 52 Pac. 168; *Dickenson v. Worcester*, 7 Allen, 19, 40 Cyc. 645, 647; *Brandenberg v. Zeigler*, 62 S. C. 18, 55 L.R.A. 417.

Appellants were not justified in draining the slough because on one or two occasions it overflowed its northerly bank. *North Point v. Utah*, 40 L.R.A. 851; *Wendlandt v. Cavanaugh*, 55 N. W. 409; *Boll v. Ostroot* (S. D.) 127 N. W. 577; *Anderson v. Drake* (S. D.) 123 N. W. 673; *Kruptke v. Stockard* (Minn.) 115 N. W. 175.

**BRONSON, J.** This is an action for injunctive relief and for damages occasioned to farm lands of the plaintiffs and interveners through the construction of a tile drain upon the lands of the defendants for the purpose of draining waters from and across the same. The appellants appeal from the judgment rendered by the trial court awarding injunc-

tional relief in favor of the plaintiffs and interveners, and demand a trial *de novo* in this court.

For the purpose of considering the principles of law applicable on this record, it is necessary to state somewhat at length some of the material facts in this case, and to incorporate herein a rough sketch marked exhibit "A" of the premises involved, in order to better comprehend such facts and the principles of law applicable thereto.

## EXHIBIT A

### RANSOM Co.

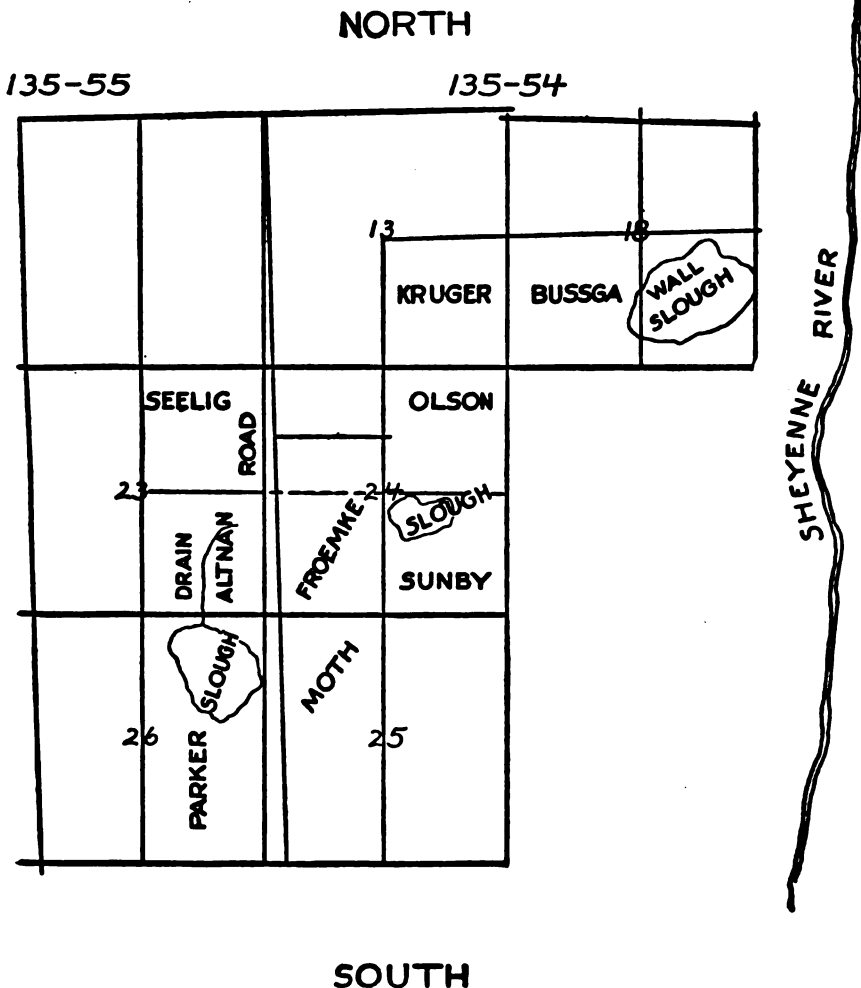


Exhibit "A," showing governmental sections and the subdivisions thereof of the land involved and its surroundings, roughly represents the lands of the party to this action and its relative location, as well as the lands of other parties, witnesses herein.

There is a road, a graded highway, between §§ 23 and 26, and between §§ 23 and 24. There are sloughs or swales shown on the exhibit, roughly representing their respective locations and sizes and known under the name of the owner of the land upon which they are situated.

On the land of the defendant Parker, consisting of 320 acres, which he purchased in March, 1914, there is situated the Parker slough. The evidence shows that this has been a slough for over thirty-five years. When full and extending up to or near the road on the north it will cover in extent on such land about 50 acres. During this time there has always been water standing in this slough the year round, excepting in the year 1880 in the spring and in the year 1891. In dry years it does not contain much water but in wet years it is nearly full. Its depth varies from zero to 3 feet and over. In November, 1916, when the slough was then measured, it contained  $40\frac{1}{2}$  acres and its then maximum depth was 3 feet. Under the testimony of Denneston, surveyor and witness for the defendant, there would be in such slough in a state of nature and without the highway grade at the north side, a depth of at least 2 feet of water therein before it would flow over to the north. This slough is the natural receptacle for the surface drainage of the lands of Johnson and Bergeson to the west and southwest. On the Bergeson land there are two small sloughs about 2 and 3 acres, respectively, in extent, which receive the surface waters on his place when the snow melts or heavy rains occur, and from these sloughs when full the drainage is into such Parker slough. In November, 1914, Parker consulted the county agricultural agent, Mr. Ulhorn, concerning the drainage of this slough. The agent first tried vertical drainage but this was ineffective. Then he advised Mr. Parker that the only thing left for him to do to get rid of such water was to put in a tile drain. Thereupon Parker secured an easement from Altman over his land to the north of such slough for the purpose of constructing a covered tile drain from such slough to a natural draw upon Altman's land. Thereafter, a covered tile drain was constructed in the months of April and May, 1915,

into this slough and upon Altman's land. It extended into the Parker land and this slough some 600 feet and upon the Altman land some 1,800 feet to the north and northeast, all laid underground to the depth in some places of 7 feet. This tile is porous tile 9 inches in diameter. The purpose of the defendant Parker in so doing is to drain the water in this slough so that he can cultivate this land, and he intends to keep this drain open so as to continue to drain this slough. On the Altman land there is a runway or draw, extending to this Parker slough and running northeasterly to the Froemke land and thence over to the Sunby slough, thence over and across the Olson land through a small slough, thence over the Kruger and Bussea lands to the Wall slough, which is a large slough consisting of some 90 acres with practically no outlet. Into this runway at the lower end of the tile drain on the Altman land the discharge waters from this slough were cast. They spread upon and over the Froemke, the Sunby, and the Olson lands, and have interfered with their cultivation of the soil and the raising of crops thereupon. The evidence discloses a substantial and practically a continuous discharge of such waters through such tile drain. The witnesses variously described this runway over these lands as to the lands it drains, the tributary watershed, its size, and characteristics. The appellants assert that it is a watercourse. It is a natural depression there existing between such Parker slough, Sunby slough, and the Wall slough. The natural slope to the north and northeast from this Parker slough is over and across the Altman, Froemke, Sunby, and Olson lands, and this runway receives from this adjacent territory the waters from winter snows, spring and other rains. The witness for the appellants, the county agent, states that there is a general slope down that way from the Parker slough, a depression or draw, a sort of valley between the hills, possibly 6 feet wide and  $1\frac{1}{2}$  to 2 feet deep. This runway flattens out as it proceeds over the Froemke, Sunby, and Olson lands. The general testimony is that very little water overflowed out of this Parker slough and over and across the road to the north and upon these lands where the runway or draw is, excepting when there were unusually heavy winter snows or heavy rains. A witness for defendant testifies that during periods of high water this Parker slough overflowed and the excess water found its outlet through this draw. There is some evidence



that contributions of waters to this runway on the Froemke land are made from an artesian well and a slough on the Seelig land, and to the Sunby slough in exceptionally wet seasons from the southeast. Prior to the construction of this tile drain these Froemke, Sunby, and Olson lands were farmed and cultivated upon and across this runway, and crops raised thereon, practically every season, with the exception of the Sunby slough some 15 acres in extent, and a small slough on the Olson land some 6 to 8 acres in extent. After this tile drain was constructed, this draw and these sloughs have been flooded. A stream of water proceeded from the lower end of this tile at times as large as 3 or 4 feet in width and 6 inches in depth. The draw on the Froemke land at times was covered with water varying in width from 117 to 142 feet. Some 15 acres of land thereon were flooded. On the Sunby land the waters flooded so as to increase the extent of the slough thereon as much as 62 to 70 acres. Crops were destroyed and some of the land could not be cultivated. On the Olson land, these waters came and flooded thereon some 15 acres more than the 8 acres of slough there, so that such 15 acres could not be cropped. Although in former years waters came down this draw from winter snows or spring rains, nevertheless these lands always theretofore could be farmed and cropped excepting as to the sloughs thereon. The evidence further discloses that in the years 1915 and 1916 the seasons were unusually wet. There is also considerable contention in the record as to whether there was a raise or ridge upon the land of Altman north of the roadway, and where the tile was laid. The appellant's witnesses disclaiming the existence of such raise or ridge and the plaintiffs' and interveners' witnesses asserting that the same exists. In any event the determination of this question does not affect, in our opinion, the principles of law applicable in this case.

On record in this case, the appellants contend:

- (1) That the waters in the Parker slough are surface waters, temporarily accumulated.
- (2) That the draw or runway across the Altman, Froemke, Sunby, and Olson lands, and thence on, is a watercourse.
- (3) That the appellants possess an easement to discharge such surface waters in such claimed watercourse.
- (4) That this natural outlet of the Parker slough has been obstructed

by the graded road, and by plowing and cultivation performed on the lands of respondents and Altman.

(5) That the flooding complained of was not occasioned by this Parker drainage, but through the extreme precipitation occurring in the years 1915 and 1916, and through the draining of the waters of the artesian well on the Seelig place.

On this record, these contentions of the appellant are readily and easily answered by the application of settled and well-known principles of law. It is first necessary to determine the status of this Parker slough and of this runway or draw under the principles of law applicable to waters. The appellants are placed in the peculiar position of contending that these very waters which they seek to discharge are while in the Parker slough surface waters, and when in this draw the waters of a watercourse. In other words, that the principles of law applicable to surface waters should apply to the Parker slough and the principles of law applicable to a watercourse to these waters when in the draw or runway.

1. The Parker slough has been and is a permanent body of water. It has there existed for a period of over thirty-five years. It does not and did not during all of these years drain off naturally through this draw. The only method of draining it is by this tile construction or by some similar artificial construction. Although its source of water supply comes from surface waters running down upon adjacent territory through the winter snows or spring or other rains, nevertheless such waters, when they reached this slough, even in a state of nature, there remained except when the slough was overflowed in seasons of unusual moisture. There they remained for purposes of evaporation or seepage in the soil, and there a pond was constituted. As such these waters in such slough lost their characteristics as surface waters. They became waters of such pond, and the principles of law applicable thereto are similar to those applicable to watercourses; the principal distinction being that in a pond or lake the waters are substantially at rest, while in a stream or watercourse they are in motion. *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73, 26 N. W. 726; *McKinley v. Union County*, 29 N. J. Eq. 171; *Palmer v. Waddell*, 22 Kan. 352; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 10 N. E. 410; *Elrich v. Richter*, 41 Wis. 318; *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243; 3 Farnham, Waters, 2557.

In this connection it is wholly unnecessary to consider whether this slough has been surcharged with water by reason of the construction of the road grade on the north; for it is the declared purpose and intention of the defendant Parker to drain this entire pond or slough by this tile drain, and it was constructed for that purpose, and it will accomplish that purpose.

These waters, therefore, in the Parker slough proper were and are not surface waters.

2. The draw or runway in question is simply a natural drainage channel for such surface waters that are occasioned by winter snows or spring rains upon the tributary lands, or from the excess of overflow waters naturally of the Parker slough. It serves this purpose only occasionally and temporarily. It possesses none of those characteristics of a definite bed, definite channel, of a permanent source of water supply, either continuous or periodic, to establish the same as a watercourse. Comp. Laws 1913, § 5341; *Rait v. Furrow*, 74 Kan. 101, 6 L.R.A.(N.S.) 157, 85 Pac. 934, 10 Ann. Cas. 1044; *Harrington v. Demaris*, 46 Or. 111, 1 L.R.A.(N.S.) 756, 77 Pac. 603, 82 Pac. 14; 2 *Farnham, Waters*, 1555.

3. The draw or runway was and is simply a natural drainway for the surface waters of the watershed that it serves. The lower landowner over whose land such natural drainway exists has no legal ground of complaint to the reception of the surface waters in such drainway from the tributary watershed, as they are accustomed to come in a state of nature. *Soules v. Northern P. R. Co.* 34 N. D. 7, L.R.A. 1917A, 501, 157 N. W. 823; 3 *Farnham, Waters*, 2599; See note in L.R.A.1917A, 517.

Although this court in *Reichert v. Northern P. R. Co.* 39 N. D. 115, 167 N. W. 136, stated that natural drainways are subject to the same rules as if they were running streams, such statement as a principle of law must be taken only in connection with the facts in that case, and not to all situations where the rights of a riparian owner upon a watercourse are concerned.

The principle of law announced concerning drainways has been principally applied to the right to drain off surface waters through such drainways, and do not involve the general and other principles of

law that apply to watercourses, and the rights of upper and lower riparian owners thereupon.

Upon the facts in this case, there is no necessity of considering whether the civil law or the so-termed common enemy rule, or any modification of the same concerning surface waters, should be applied in this state. For, under such facts and the principles of law stated, the appellants neither had nor have any legal right to drain or discharge those waters of the Parker slough by and through such artificially constructed tile drain to the damage of lower landowners, either under the civil law or under the common enemy rule, concerning the disposition of surface waters, especially when the maxim "*sic utere tuo*" is applied, in the consideration of the common enemy rule. Justinian Dig. bk. 39, title 3, § 1; Code Napoleon, § 640; Partidas, bk. 3, title 32, § 15; Ware, Roman Water Law, pp. 21, 57; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120; Hooper v. Wilkinson, 15 La. Ann. 497, 77 Am. Dec. 194; 3 Farnham, Waters, 2574, 2578; Brandenburg v. Zeigler, 62 S. C. 18, 55 L.R.A. 414, 89 Am. St. Rep. 887, 39 S. E. 790; Boll v. Ostreet, 25 S. D. 513, 127 N. W. 577; Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894; North Point Consol. Irrig. Co. v. Utah, & S. L. Canal Co. 16 Utah, 246, 40 L.R.A. 851, 67 Am. St. Rep. 607, 52 Pac. 168.

It is clear, therefore, that the appellants possess no easement to so drain the Parker slough through such tile drain into said drainway.

4. The appellants possessing no legal right to drain this Parker slough by this artificial construction to the damage of lower landowners, it is therefore immaterial whether the natural outlet of such Parker slough has been obstructed either by the graded road or by the plowing and cultivation of the draw involved.

5. It is likewise immaterial whether the flooded condition of the lands of the respondents herein was, in part, due to the excessive precipitation of rain or snow during the time of the operation of such tile drain, or was, in part, occasioned by drainage from the Seelig artesian well; for it is clear from the record that the artificial construction of the appellants imposes upon the land of the respondents an additional burden of water in excess of that which naturally would come there, whether the season be wet or dry, and to that extent, appreciable as the

record herein discloses, the respondents' lands are charged with an artificial burden thereupon which the appellants have no legal right to so create.

The appellants contend that this clause presents questions of vital concern to the agricultural needs of this state in drainage and reclamation, and that the interests of good husbandry and of agricultural development require, as a matter of policy, the recognition of the right to the drainage of marshes and sloughs of stagnant water in the beneficial improvement of farm lands in this state.

This record has been considered carefully by this court. The application of well-settled principles of law satisfies this court that the judgment of the trial court was right.

In this state, where the principal industry is the tilling of the soil, it is important to recognize, in maintaining our farming interests and the product of the farmer's toil, that many developed, cultivated, and productive farms have so become upon the reliance of the farmers thereof that the burdens of nature imposed upon their lands would not be increased by artificial constructions to their damage without compensation to them except in accord with settled principles of property rights. Those who hereafter desire, in the beneficial improvement of their own farm lands, to cast some of these burdens of nature upon such farm lands below them, must equally recognize and rely upon these settled principles of law.

The judgment of the trial court is affirmed.

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GEORGE E. WALLACE, H. H. Steele, and F. E. Packard, as Members of the Tax Commissioners of the State of North Dakota, Petitioners and Respondents, v. THE HUGHES ELECTRIC COMPANY, R. W. Dutton and C. B. Aasness, and E. A. Hughes, Defendants and Appellants.

(171 N. W. 840.)

**Taxation — power of state tax commission.**

1. The state tax commission, being a board created by legislative enactment, possesses such powers only as the legislature has expressly conferred upon it.

**Taxation—state tax commission—limited powers.**

2. The power conferred upon the state tax commission by subdivision 7 of § 2088, Compiled Laws 1913, to summon witnesses to appear and give testimony and produce records, books, papers, and documents is not an arbitrary or unlimited power, but one to be exercised reasonably and within proper limits.

**Taxation—state tax commission—power to summon witnesses—jurisdiction of tax commission.**

3. In order to justify the entry of an order by a district court, under § 2089, Compiled Laws 1913, to compel obedience to an order of the state tax commission for the appearance of witnesses and the production of records, books, and documents, it must appear that the order was made in some matter before, and within the jurisdiction of, the tax commission, and that there was some reasonable basis for the action of the tax commission.

**Taxation—state tax commission—summoning witnesses—petition to district court to compel attendance of witnesses.**

4. It is held that the petition in the instant case fails to state facts sufficient to justify the entry of an order, by a district court, to compel witnesses to appear and give testimony and produce records, books, and documents before the state tax commission.

Opinion filed January 31, 1919.

From an order of the District Court of Burleigh County, *Nuessle, J.* Reversed.

*Newton, Dullam, & Young*, for appellants.

Commissions such as the tax commission of North Dakota are mere creatures of the statute, and possess no power except what the statute expressly confers upon them. *Railroad Comrs. v. Oregon River & Nav. Co.* 17 Or. 85, 2 L.R.A. 195, 19 Pac. 702; *Grand Rapids, Indiana R. Co. v. Michigan R. Commission* (Mich.) 150 N. W. 154; *Mechem*, Pub. Off. § 511.

The tax commission has no power to assess the property of light, heat, and power plants. *State ex rel. Miller v. Leach*, 33 N. D. 513, 157 N. W. 492.

A legislative body cannot inquire into the private affairs of a citizen merely to suit the whims and fancies of the curious, and where it may not inquire it may not compel the attendance of witnesses and punish for their refusal. *Kilbourn v. Thompson*, 26 L. ed. 377-387.

The inspection of records must be limited to what is material in ascertaining the knowledge desired. *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 666; *Ex parte Brown*, 72 Mo. 83, 37 A. R. 426.

If an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means for carrying out its provisions are not adequate or effective, it is incumbent on the courts to declare it void and inoperative. *Hilbourn v. St. Paul etc. R. Co.* 23 Mont. 229, 58 Pac. 515; *State v. Westside R. Co.* 146 Mo. 155, 47 S. W. 959.

The order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. *Hale v. Henkel*, 50 L. ed. 666, *supra*; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 928.

The courts will not enforce an order which a commission has no authority to make, or which, under the circumstances of the particular case, was unreasonable or unjust. *State v. Des Moines etc. R. Co.* 87 Iowa, 644, 54 N. W. 461; *State v. Chicago etc. R. Co.* 26 Iowa, 304, 53 N. W. 253; *Railway Co. v. State*, 23 Okla. 931, 100 Pac. 16; *Railway Co. v. Railway Commission*, 52 Wash. 360, 28 L.R.A.(N.S.) 1023; *State v. Kansas C. R. Co.* 47 Kan. 497, 29 Pac. 208; *Nashville, C. & St. L. R. Co. v. State*, 137 Ala. 439, 34 So. 401.

*William Langer*, Attorney General, and *Edw. B. Cox*, Assistant Attorney General, for respondents.

The supervisory powers, as well as the powers of review and re-assessment, as granted to the tax commission, is constitutional. *State ex rel. Hessey v. Daniels*, 143 Wis. 649; *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478; *People v. Kinney*, 124 Mich. 491; *Ames v. People*, 26 Colo. 83; *State ex rel. Brown v. Meyers*, 52 Wis. 626; *State ex rel. Fawcett v. Harris*, 1 N. D. 594, 45 N. W. 1102; *Ex parte Corliss*, 16 N. D. 470.

As to what powers are conferred by "general supervision." *Vantongernan v. Heffern*, 5 Dak. 180, 38 N. W. 52; *Moore v. Robbins*, 96 U. S. 530; *Sheply v. Cowan*, 91 U. S. 340; *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478.

An order by a court to produce certain books and papers in a civil action cannot be refused on the ground that it violates the constitutional provisions against unreasonable search and seizures. *Adams v.*

New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Consolidated Rendering Co. v. Vermont, 207 U. S. 541; Re Dunn, 9 Mo. App. 255; Cooperative Bldg. & L. Asso. v. State, 156 Ind. 463, 60 N. E. 146; Washington Nat. Bank v. Daily, 166 Ind. 631, 77 N. E. 53; Sante Fe P. R. Co. v. Davison, 149 Fed. 603; Anti-Kalsomino Co. v. Kent, 79 N. E. 186; Re Moser, 101 N. W. 588; Re Conrades, 85 S. W. 150; People v. Combes, 158 N. Y. 532, 53 N. E. 527; Interstate Commerce Commission v. Brimson, 154 U. S. 447.

The power of the legislature to delegate the right to quasi judicial or administrative bodies to compel witnesses to attend and testify before them has been exercised by almost every state in the union. 40 Cyc. 2156; 10 Ohio S. & C. P. Dec. 574; 8 Ohio N. R. 205; 10 Ohio Dec. Reprint 90; 18 Ohio L. J. 340; 117 S. W. 508.

CHRISTIANSON, J. This is an appeal from an order of the district court of Burleigh county commanding the appellants, Dutton, Aasness, and Hughes, to appear before the state tax commission and give testimony and produce books and records relating to the value of the property, the earnings, expenses, and general financial condition of the Hughes Electric Company.

The powers and duties of the state tax commission are defined by § 2088, Comp. Laws 1913, as amended by chapter 232, Laws 1917. The statute, so far as now pertinent, is as follows:

"It shall be the duty of the commission and it shall have the power and authority:

"1. To have and exercise general supervision over the administration of the assessment and tax laws of the state, over assessors, town, county and city boards of review and equalization and all other assessing officers in the performance of their duties, to the end that all assessments of property be made relatively just and equal in compliance with the laws of the state.

"2. To confer with, advise and give the necessary instructions and directions to local assessors as to their duties under the laws of the state and to that end call meetings of local assessors of each county to be held at the county seat of such county, for the purpose of receiving necessary instructions from the commission relative to the duties of their office and to the laws governing the assessment and taxation of all classes of property.



"5. To require township, village, city, county and other public officers to report information as to the assessment of property, collection of taxes, receipt from licenses and other sources, the expenditure of public funds for all purposes and such other information as may be needful in the work of the commission in such form and upon such blanks as the commission may prescribe.

"6. To require individuals, copartnerships, companies, associations and corporations to furnish information concerning their actual funds or other debts, current assets and liabilities, value of property, earnings operating and other expenses, taxes and all other facts, which may be needful to enable the commission to ascertain the value and relative burdens borne by all kinds of property in the state.

"7. To summon witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matter which the commission may have authority to investigate or determine.

"8. To cause the deposition of witnesses residing within or without the state or absent therefrom to be taken upon notice to the interested party, if any, in like manner that depositions of witnesses are taken in civil actions in the district court in any matter which the commission may have authority to investigate or determine.

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"10. To appoint a special assessor and deputies under him and cause to be made in any year a reassessment of all or any real and personal property or either in any assessment district when in the judgment of said commission such reassessment is desirable or necessary to the end that any and all property in such district shall be assessed equally as compared with like property in the county wherein such district is situated. Upon the completion of such reassessment the said assessor shall certify to such assessment and file the same with the county auditor, and the county auditor shall forthwith notify the members of the board of county commissioners who shall meet the first Monday in the following month of the year and then and there hear all grievances and complaints thereon, and proceed to review and equalize such assessments. Thereupon the said assessment shall be filed with the county auditor and such lists shall supersede and be in place of the original assessment made for such year upon such property and the county auditor shall extend and levy against said property so reassessed

the taxes thereon for such year according to such reassessment in the same manner as though such list was the original assessment list of such property.

• • • • •  
 "13. To examine carefully into all cases where evasion or violation of the laws for assessment and taxation of property is alleged, complained of, or discovered, and to ascertain wherein existing laws are defective, or are improperly or negligently administered.

"14. To consult and confer with the governor of the state upon the subject of taxation, the administration of the laws in relation thereto, and the progress of the work of the commission, and to furnish the governor from time to time such assistance and information as he may require."

(The omitted subdivisions of the section are not involved in this controversy.)

Section 2089, Comp. Laws 1913, provides: "Oaths to witnesses in any matter under the investigation or consideration of the commission may be administered by the secretary of the commission, or by any member thereof. In case any witness shall fail to obey any summons to appear before said commission, or shall refuse to testify or answer any material question, or to produce records, books, papers, or documents when required to do so, such failure or refusal shall be reported to the attorney general, who shall thereupon institute proceedings in the proper district court to compel obedience to any summons or order of the commission, or to punish witnesses for any such neglect or refusal. . . ."

This is a proceeding instituted by the attorney general of the state under § 2089, *supra*, to compel the appellants, Dutton, Aasness, and Hughes, to appear and testify before the state tax commission, and to produce certain books and records relating to the property, earnings, expenses, and financial condition of the Hughes Electric Company,—a public utility corporation, organized under the laws of the state of Minnesota, and engaged in the business of furnishing electricity and other commodities to the public in the city of Bismarck, and elsewhere.

The attorney general's petition in this case avers that the petitioners are members of the state tax commission, and that in performance of their powers and duties as such commissioners, as prescribed by §

2088, Comp. Laws 1913, and the amendments thereof, "the said tax commission for the purpose of ascertaining and securing the information concerning the value of the property of the Hughes Electric Company, and the capital fund, debts, current assets, and liabilities, and operating and other expenses of such company, and such facts as might be needful to enable the commission to ascertain the value of the property of such Hughes Electric Company as provided by law, and for the purpose of performing their duties as members of such tax commission as prescribed by law," in April, 1917, prepared and mailed to the Hughes Electric Company a notice commanding said company to have its managing officers appear before said tax commission "at a stated time and place," and then and there to testify as to the value of the property, the earnings and general financial conditions of said company, and to "bring with them such books, papers, and records as may be necessary to consult, or determine the above matters with reference to said company."

It is further averred that the Hughes Electric Company, and its managers and officers, refused and neglected to appear before the tax commission, or produce the books, papers, and documents, as directed in said notice.

The petition further avers that the state tax commission, in May, 1917, issued a subpoena or subpoenas addressed to the above-named appellants, Dutton, Aasness, and Hughes, commanding them and each of them, to appear before the state tax commission, at a designated time and place, and "then and there to testify generally before the said commission as provided for in §§ 2088 and 2089 of the Compiled Laws of 1913 for the state of North Dakota as to such matters and things as you have knowledge of concerning the actual value of the property, the earnings and general financial condition of the Hughes Electric Company, a corporation, doing business in the city of Bismarck, county of Burleigh, and state of North Dakota." And further commanding said Dutton, Aasness, and Hughes, to bring with them at the time and place stated in said subpoena "the minute book, ledger, stock book, blue prints or books of engineering department, showing the extent, location, and the cost of the physical property, and such other records of said Hughes Electric Company as may be necessary

to determine the actual value of the property, earnings and general financial condition of said corporation."

It is further averred that said respondents, Aasness, Dutton, and Hughes, failed to obey the commands of said subpœna or subpœnas, and that "it is necessary and proper, and that it is the duty of such tax commission as prescribed by law to inquire into the capital stock, debts, current assets, and liabilities, the value of the property, the earnings and the operating expenses and other expenses, its taxes, and all facts concerning such company needful to enable the commission to ascertain the value of the property of such Hughes Electric Company, in order that it may fulfil its functions and duties as prescribed by law, in order that it may properly cause to be assessed and make recommendations of assessment, all concerning such Hughes Electric Company."

The petition further avers that the said state tax commission has reported to the attorney general the failure of the respondents to obey the said notice and subpœnas.

In the return and answer it is admitted "that on the 19th day of May, 1917, there was served upon the above-named respondents Aasness and Dutton an alleged command to appear before said tax commission on the said day at 2 o'clock P. M., . . . that said service was made about 1:45 o'clock P. M. of said day." And it is averred "that said respondents did not have access to any books, papers, or records of the Hughes Electric Company, except the customer's register thereof; . . . that they have been in the employ of said company only a short time and then were and now are without knowledge or information as to the value of the property, earnings, and general financial condition of said company, or the contents of the general records thereof."

It is further averred that "said Hughes Electric Company is a foreign corporation with its principal office at Minneapolis, Minnesota; and that its books, papers, and records, except the blue prints of its equipment and pipe lines and its current customer's register, are, and at all times since its organization have been, kept at its said principal place of business."

It is further averred that "said tax commission, its inspectors, engineers, and agents, were given access to the property, machinery, and

equipment of said Hughes Electric Company; and that they have been enabled thereby to secure all of the information and data necessary and requisite to determine the value of such property, machinery, and equipment." And also "that the property of said corporation has been assessed for the year 1917 by the city assessor of the city of Bismarck; that the respondent company, its officers, and managers, showed to such assessor the blue prints and engineering records of said company, and furnished him with all the data, facts, and information demanded and required by him for the purpose of making such assessment."

The answer denies that it is necessary and proper, or the duty of the tax commission, to make the proposed inquiry, and in that behalf alleges that the tax commission is without authority to make assessment of the property of the Hughes Electric Company.

It is also averred that the orders of the tax commission are unreasonable, arbitrary, and void, and that such orders and subdivisions 7 and 8 of § 2088, Comp. Laws 1913, are violative of § 18 of the state Constitution and the 4th Amendment to the Federal Constitution, which guarantee to the people the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

The answer also avers that the attorney general's petition does not state facts sufficient to justify the issuance of an order or writ to compel the respondents to testify or produce books, papers, and documents as demanded by said tax commission.

The trial court ordered that E. A. Hughes, Robert W. Dutton, C. B. Aasness, and each of them, appear before the tax commission on the 27th day of November, 1917, at 2 P. M., of same day, then and there to testify as to such matters as they may have knowledge of, concerning the value of the property, earnings, expenses, and general financial condition of the Hughes Electric Company, and to bring with them at said time and place the minute book, ledger, stock book, inventory book, and blue prints or books of the engineering department, showing the location and the cost of the physical property of the Hughes Electric Company. And the case comes to this court on appeal from such order.

The first question which naturally presents itself is whether a case is presented which falls within the above-quoted statutory pro-

visions, and justified the trial court in entering the order appealed from.

It is a constitutional mandate in this state that "all taxable property" (except the property of railroads, express companies, freight line companies, car equipment companies, private car line companies, telegraph or telephone companies or corporations, which is assessed by the state board of equalization) "shall be assessed in the county, township, village, or district in which it is situated, in the manner prescribed by law." Const. § 179, as amended. The uniform and unbroken policy has been to have all taxable property (except that assessed by the state board of equalization) assessed by local assessors, and to have the assessment reviewed and equalized in the first instance by the board of the township, village, or city wherein the property assessed is situated. And for more than twenty years a system has been in vogue in this state "whereby the local boards of review, where there are such boards, shall equalize the assessments as between individual taxpayers, the county board of equalization as between the several assessment districts, and the state board of equalization between the several counties." *First Nat. Bank v. Lewis*, 18 N. D. 390, 121 N. W. 836. This system was not abrogated by the creation of the state tax commission. In fact the very language of the act creating the commission and defining its duties and powers recognizes the existence and continuation thereof, and the continued performance of their respective duties by the former taxing and reviewing officers. It is still the duty of the assessors to assess, and of the different boards of review to review and equalize the assessments within their respective jurisdictions.

It is true (and the attorney general lays great stress on this fact) certain supervisory powers are conferred upon the tax commission by subdivision 1 of § 2088, Comp. Laws 1913. But the attorney general's petition herein does not present a case wherein the tax commission seeks to exercise supervision over assessing officers.

No assessing officer or reviewing board is a party to this proceeding, nor is there any allegation of failure or neglect of duty on the part of any such officer or board.

The reason assigned for the proposed inquiry is that it is "needful to enable the Commission to ascertain the value of the property of such Hughes Electric Company in order that the commission may ful-

fil its functions and duties as prescribed by law, and in order that it may properly cause to be assessed and make recommendations of assessment all concerning such Hughes Electric Company."

The proceeding was instituted in July, 1917, and the order appealed from was made November 12, 1917. Hence, the property of the Hughes Electric Company must have been assessed by the assessor for the year 1917 before the proceeding was instituted, and all proceedings relating to such assessment, including the proceedings before the county and state boards of equalization, must have been fully completed before the order was entered. And yet there is not even a suggestion in the petition (or in the record at all), that the assessor or any board of review has failed to perform his or its duty, that the property has escaped taxation, or that there has been any complaint or discovery of evasion or violation of the laws relating to assessment.

It may also be noted that there is nothing in the attorney general's petition to indicate that Hughes, Dutton, or Aasness have any connection whatever with the Hughes Electric Company, or that it is in any manner within their power to produce any of the books, papers, and documents sought. So far as the showing made by the attorney general is concerned, these men may be total strangers to and have no connection whatever with the Hughes Electric Company. It is true there are certain statements in the answer which indicate that Dutton and Aasness are employed by the company, but there is nothing to indicate in what capacity they are employed, and it is positively averred that they "did not have access to any books, papers, or records of the Hughes Electric Company," which the order appealed from commanded them to produce. And it is further averred that they were and are "without knowledge or information as to the value of the property, earnings, and general financial condition of said company or the contents of the general records thereof."

While the legislature may confer authority upon a nonjudicial body to summon witnesses and require the production of books and records in a proceeding properly pending before, and within the jurisdiction of, such body, it is scarcely necessary to say that the lawmaking power is limited by the constitutional restrictions, and that the legislature may not itself exercise, still less confer upon any merely administrative body, "a general power of making inquiry into the private

affairs of the citizen," or otherwise destroy or impair those fundamental personal rights guaranteed and "recognized by the Constitution as inhering in the freedom of the citizen." *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125. Our state Constitution contains counterparts of the guaranties of personal rights contained in the Federal Constitution.

The state tax commission was created by legislative enactment. It is elementary that a board so created possesses such powers only as the legislature has expressly conferred upon it. *Railroad Comrs. v. Oregon R. & Nav. Co.* 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; *Miller v. Oakwood Twp.* 9 N. D. 623, 84 N. W. 556.

It will be noted that the statute under consideration makes no provision either that the testimony given or books and records produced before the tax commission shall be guarded with secrecy, or that such testimony or evidence shall not be used in any criminal proceeding, against the person required to adduce it. Such guaranties are usually found in laws permitting inquiries into private business affairs. The very absence of such restrictions in the statute under consideration is indicative that the legislature must have intended that the power conferred should be exercised only in some matter or proceeding properly pending before the commission, and that the scope of inquiry should be reasonable, restricted to the particular matter under consideration, and in no case infringe upon any of the inherent personal rights recognized by the Constitution.

Manifestly the legislature did not intend to invest the tax commission with arbitrary power. It clearly contemplated that the power conferred should be exercised, not capriciously or arbitrarily, but with reason.

In other words the legislature intended that there should be some reasonable basis for an order of the tax commission summoning witnesses to appear and testify and produce books, records, and documents.

The petition (and record) in the case at bar fails to disclose any basis for the proposed inquiry. There is nothing asserted in the petition in this case which might not with equal force and at all times be asserted against any, or every, taxpayer in the state. If the tax com-



mission had the power to require the attendance of witnesses and the production of books and documents under the facts set forth in the petition in this case, it unquestionably has the power to issue similar orders, and conduct similar inquiries with respect, to every taxpayer in the state, regardless of whether there is any reason whatsoever for such action.

The order appealed from must be reversed. It is so ordered.

The foregoing opinion was prepared while former Chief Justice BRUCE was still a member of the court, and he concurred in the opinion in its entirety. Mr. Justice BRONSON, who succeeded Judge BRUCE as a member of this court, being disqualified, Judge CRAWFORD of the Tenth Judicial District was called in and sat as a member of the court upon the final disposition of the case. Judge CRAWFORD also concurred in the opinion in its entirety.

ROBINSON, J. I concur in the rules announced in the syllabus. The tax commission holds office under an act which is entitled "An Act Creating a Permanent Tax Commission Defining Its Powers and Duties and Making Appropriations for the Maintenance thereof." Laws 1911, chap. 303. The title of the act is in all respects similar to that of an act creating the office of a board of state auditors and prescribing the duties thereof. The latter act was justly held void because the subject of the act was not expressed in its title. *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N.W. 85.

In 1917, the legislature re-enacted that part of the act which relates to the powers and duties of the tax commission. Chap. 232. The act declares that the tax commission shall have power to require individuals, corporations, companies, associations and corporations to furnish information concerning their actual funds or other debts, current assets, and liabilities, value of property, earnings, operating and other expenses, taxes, and all other facts which may be needful to enable the commission to ascertain the value and relative burdens borne by all kinds of property in the state. Also to summon witnesses to appear and give testimony and procure records, books, papers, and documents relating to any matter which the commission may have authority to investigate and determine.

This is an appeal from an order of the district court, which is that on November 27, 1917, the defendants do appear before the tax commission at their office in the capital to testify concerning the value of the property, earnings, expenses, and general financial conditions of the Hughes Electric Light Company and to bring with them the minute books, ledger, stock books, inventory books, and blue print books of the company showing the location and cost of the property. Now under the Constitution the property of every party must be assessed for taxation in the county and city where it is situated, and the assessment must be made in the manner prescribed by law. There can be no valid assessment without a law prescribing the manner of making it, and unless it is made in the manner prescribed.

There is no claim that in the year 1917 the property of the company was not fairly assessed for taxation and equalized in the manner prescribed by law, or that the proper boards of equalization failed to approve of the assessment and to accept the same as a basis for the tax levies of the year 1917. There is no showing, either in the complaint or in the order of the court or elsewhere, that the investigation demanded and ordered has any legitimate and necessary purpose and object. For aught that appears, it may be for the purpose of satisfying the idle curiosity of the commissioners. True, it is alleged that the information sought is necessary in order that the board may fulfil its functions and duties, and that it may cause the property to be assessed and make necessary recommendations concerning the assessment of the property, but that is a mere conclusion which is not sustained by any statement of facts.

The order of the court is that on November 27, 1917, the defendants appear before the tax commission to testify to the value of the property, expenses, earnings, and general financial conditions of the company at said time, and to produce the minute books, ledger, stock books, inventory books, blue prints or books of the engineering department, showing the location and cost of the property. It needs no argument to show that any such a procedure must be harassing and vexatious, inquisitorial and expensive. To enforce the order would be to deprive the defendants of their time and property in an arbitrary manner without any compensation and without due process of law.

Time is money. Money is property. To deprive a man of his time

is to deprive him of his property. Under such an order the examination of defendants might be continued from day to day until the loss of their time and business would amount to hundreds of dollars, and their valuable books and papers might be detained indefinitely to their great loss. For it is well known that like the Irish policeman, all those boards are inclined to show and to exceed their authority. "There is too strong a desire in the human heart to exercise authority." Every administrative board is well disposed to exceed its authority.

By the Constitution the defendants are guaranteed the right to acquire, possess, and protect property, and to pursue and obtain liberty and happiness, and to hold their books and papers without unreasonable searches and seizures. But what avails the guaranty if it may be countervailed by such an order on defendants to quit their business, and with the books and papers to appear and waste their time and money undergoing a bootless and vexatious examination by the tax commission.

So far as the statute gives the commissioners power to demand such an examination it is void. Clearly the order to produce the books and papers is not based on any legal or reasonable cause, and the order is void because it is in direct conflict with the constitutional rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. In many cases people would prefer to burn their books or to keep no books, rather than to hold them subject to such an inspection and examination. Of necessity the tax system is burdensome, but there is no reason for making it vexatious.

At the rush close of every session, with no thought of the Constitution, the legislature passes bills to create boards for this and for that and to expend the public moneys. And every board does magnify its office and authority. Hence, it behooves the courts, with a strong hand, to sustain the guaranties of personal rights and civil liberties.

The order should be reversed and the case dismissed.

BIRDZELL, J. (dissenting). I dissent from the conclusion reached by the majority of the court in this case, and, owing to the importance of the main question involved, I deem it a duty to set forth the reasons for my dissent.

As I read the majority opinion, it is founded upon a misapprehension of the powers and duties of the tax commission that is so gross and so far reaching as to amount to the practical nullification of the obvious purposes which the legislature had in view in providing for the creation of the commission. In order to make clear the reasons for my dissent, it is necessary to advert to the character of the proceedings in the instant case. The petition shows that in April of the year 1917, the tax commission, in pursuance of the powers and duties expressly imposed upon it by law, attempted to obtain from the Hughes Electric Company of Bismarck information relative to the value of its property, its earnings and financial condition, which the legislature had made it the duty of the commission to obtain. The means selected for the communication of this information was that of asking the managing officer of the company to appear before the commission at a stated time, in the Capitol Building, there to testify to the facts within the range required by the statute. This court should, and doubtless does, take judicial notice of the fact that the Hughes Electric Company operates in the capital city, and of the degree of inconvenience that would be involved in complying with the request made by the tax commission. The petition further shows noncompliance with this request, and that thereafter, on the 19th day of May, a summons and subpoena was served on the respondents Aasness and Dutton, and that on the 21st day of May, still during the assessment season, a summons and subpoena was served on the respondent Hughes. It is also alleged that all of the respondents have neglected and refused to appear before the commission at the time and place stated in the summons and subpoena, or at all. "And that the Hughes Electric Company, its managers and officers, wilfully and wrongfully refuse and neglect to appear before such tax commission, or to in any manner submit to an investigation by such tax commission, concerning its capital fund, its current assets and liabilities, the value of its property and earnings, its operating expenses, or to submit any other facts which might be needful to enable the said tax commission to ascertain the value of the property of the said Hughes Electric Company."

The petition contains further allegations to the effect that during the period and at the times when the petitioners sought, as herein above indicated, to obtain the desired information from the respond-

ents, it was in regular session as required by law and engaged in the performance of the duties imposed upon it, among which is that of requiring individuals, partnerships, companies, associations, and corporations to furnish information concerning their capital stock, the earnings, and the operating expenses and other expenses, its taxes, and all facts concerning such company needful to enable the commission to ascertain the value of all kinds of property in the state; also that the information was needed to enable the commission to ascertain the value of the property of the Hughes Electric Company and that it was required in order that the commission might "fulfil its functions and duties as prescribed by law, and in order that it may properly cause to be assessed and make recommendations of assessment" of such property. Such are the allegations of the petition. The answer denies the ability of the respondents Aasness and Dutton to respond to the subpoena duces tecum, and denies further "that it is necessary and proper, and the duty of the said tax commission, to inquire into the capital stock, debts, current assets, and liabilities, value of the property, earnings, operating expenses, and other expenses of said corporation to fulfil its functions and duties as prescribed by law, or for any other purposes, or at all;" and it is alleged that the property "has been assessed for the year 1917 by the city assessor of the city of Bismarck; that the respondent company, and its officers and managers, showed to such assessor the blue prints and engineering records of said company, and furnished him with all of the data, facts and information demanded and required by him for the purpose of making such assessment;" also that the agents of the tax commission were given access to the property, machinery, an equipment of the Hughes Electric Company; and "that they have been enabled thereby to secure all of the information and data necessary and required to determine the value of such property, machinery, and equipment." It is further alleged that the respondents have been and are ready and willing to furnish to the proper assessing officer of the city of Bismarck all the data and ✓ information reasonably necessary to make an assessment of the company. It is then alleged and contended that the sections of the statute under which the tax commission proceeds to summon witnesses are unconstitutional, and that the orders and commands of said tax commission are unreasonable, unjust, arbitrary, and void, and violative of

§ 18 of the Constitution of this state and the 4th and 14th Amendments of the Constitution of the United States. The issues framed by the petition and the return were before the lower court and were resolved in favor of the petitioners. The petition, the return, and the order constitute the entire record upon this appeal.

The majority opinion decides upon this record that there is no real or apparent reason or no reasonable basis for the order entered by the lower court. This seems to be the sole basis for the reversal of the order. To me it is inconceivable that such a conclusion upon such a record can be in the least consistent with the ordinary exercise of the powers granted to the tax commission by the legislature, and, in my judgment, it constructs all but an insuperable barrier to the performance by the tax commission of the duties clearly imposed upon it. The opinion seems to presuppose that the order is harsh and supports unnecessary inquisitorial power, or a power only to be resorted to in extreme cases. As a matter of fact, the order only requires the respondents to impart information which it is only fair to presume similar corporation managers have done without hesitation. It is manifestly no more inquisitorial in its nature than a request for the filling out of a blank form which, when completed, would contain the information demanded. Aside from the mere matter of convenience, there can be no distinction between requesting information to be supplied upon a blank furnished by the tax commission and requesting that it be supplied from the personal knowledge of those who may be possessed of the information (refreshed and supplemented by records regularly kept), and who are asked to communicate that information verbally instead of in writing. The petition clearly shows that ample opportunity was afforded to the respondents to furnish the information, and that they did not do so; and the respondents do not even argue that they should not be required to furnish the information in the manner requested because of the inconvenience entailed. It is, however, contended that the books of the respondents are in the state of Minnesota, consequently outside the jurisdiction of this state. This contention goes to the legal power only. Inasmuch as the majority opinion does not discuss that question, I leave it untouched. No argument is advanced that could not likewise be advanced by any individual, partnership, or corporation that might

be requested to supply such information by filling out a blank. The appellants in effect contend that the tax commission has no business with such information, and the majority opinion in effect sustains this contention. If the tax commission has not the right to have this information from the defendants, clearly they have not the right to obtain it from others. We should bear in mind that the action of tax officers as well as other officers is clothed with the ordinary presumption of good faith and honest official intention. See *Barnes v. Wayne County*, 194 Mich. 540, 161 N. W. 237. And it is not to be presumed that a tax officer vested with inquisitorial power "would desire to inquire into the private affairs of the citizen for any other purpose than those connected with his official duty." *Stanwood v. Green*, 2 Abb. U. S. 184, Fed. Cas. No. 13,301.

The vital question is whether or not the legislature intended that the tax commission should obtain information of this particular character. The wisdom of leaving to the legislature a large discretion not only in the selection of the subjects of taxation and in the determination of the extent, but also in the mode, of enforcement, has, I believe, been seldom if ever questioned since the decision of the Supreme Court of the United States in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; and the impropriety of judicial interference with, or supervision over, administrative agencies, acting under legislative direction, is everywhere recognized. Said Chief Justice Marshall, in *M'Culloch v. Maryland* (page 639): "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. . . . We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

Under the Tax Commission Law the supervisory power of the tax commission is analogous to that of the commissioner of internal revenue of the Federal government, and is expressed in the statute in much the same language as the powers and duties of that officer are expressed in the Federal statutes. In the case of *Stanwood v. Green*, *supra*, it was said: "It is further provided that it shall be the duty of the supervisor, under the direction of the commissioner, to see that all laws and regula-

tions relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto; and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes he shall have the power to examine all persons, books, papers, accounts, and premises, and to administer oaths, and to summon any person to produce books and papers and to appear and testify before him." In speaking of this power, the Federal court said: "That there exists a necessity for taxation, and to a very large amount, is not denied. That the amount, the subjects of taxation, and the mode of assessing and collecting the same, are questions alone to be determined by Congress, the lawmaking power, and with which the courts have nothing to do, it being their duty to expound and enforce the laws, is also admitted. It was competent for Congress to provide for the appointment of such officers as might be deemed necessary for the collection of the revenue, and to prescribe their duty." The court, then, after referring to the powers above named, under three distinct heads,—those of (1) seeing that the laws are faithfully executed and complied with; (2) preventing and punishing frauds; (3) examining into the efficiency and conduct of revenue officers,—continues: "And to enable him to perform any one or all of these duties, he is invested with these extraordinary powers, as they are termed, without which he would be unable to perform the duty assigned him." The court held that the act was constitutional, and that under it the respondents were compellable to produce their books and papers *without having disclosed to them the purpose for which the inspection was had*. See also *Re Strouse*, 1 Sawy. 605, Fed. Cas. No. 13,548, and *Re Meador*, 1 Abb. U. S. 317, Fed. Cas. No. 9,375. The first paragraph of the syllabus in the latter case is as follows: "It is not necessary, in order to support an application by a supervisor of internal revenue, or an attachment to compel a person liable to taxation to appear and testify and produce his books, etc., that the supervisor should appear to have acted, in issuing the summons, under any special instructions from the Commissioner of Internal Revenue. The supervisor must obey any special instructions which are shown to have been given, but, in the absence of proof of instructions, it will be presumed that his acts have been in pursuance of his official duty."



In the case of *State ex rel. Hessey v. Daniels*, 143 Wis. 649, 128 N. W. 565, the supreme court of Wisconsin upheld the power given to the tax commission to reassess the property of a particular assessment district, and, in explaining the theory upon which a state administrative agency is justified, says: "The state has a vital interest in insisting that its laws pertaining to taxation be honestly and fairly administered to the end of that the burden of taxation may be equitably distributed. . . . So, the state, in endeavoring to enforce the requirements of the law in regard to the assessment and equalization of property, is not acting as a mere interloper exercising a paternalistic function for the purpose of exploiting its right so to do, but is attempting in good faith to perform a duty in which its citizens, generally, have something more than a passing interest." See also *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881. Surely it is competent for the legislature to give inquisitorial powers to a board of this character as extensive as those given to assessors. It has been held that assessors may compel banks to disclose cash registers, draft registers, personal accounts, and individual ledgers showing the accounts of its patrons in the interest of securing a just valuation for taxation of all property. *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N. E. 53.

The majority opinion seems to intimate that if some character of proceeding were pending before the tax commission, it might possibly be entitled to obtain information in the manner proposed. Just what would constitute a "matter pending," however, is not defined, and if information of this general character cannot be obtained by an administrative body intrusted with general supervision, and even with power to order a reassessment, as will be demonstrated later, except in response to some kind of a complaint or when there is some "matter pending," it is quite apparent that an administrative body of the presumed importance of the tax commission will be wholly at a loss to proceed with its regular functions of supervision and administration. If the information which the law requires the commissioners to obtain cannot be had except under the limitations indicated in the majority opinion, intelligent supervision and efficient administration become impossible. This argument seems to me to be quite effectively disposed of by the supreme court of Indiana in the case of *Co-operative Bldg. & L. Asso.*

v. State, 156 Ind. 463, 80 N. E. 146, where, in answer to the argument that the inquisitorial power of the county assessor should be limited to the assessment season and to instances of special proceedings to add omitted property to the tax duplicate, the court said (p. 469): "Assessors may search for omitted property *independent of any proceeding* to add omitted property to the duplicate; they should first find it." It seems that if the statute contemplated that the powers of the tax commission were only to be exercised in furtherance of special proceedings before it, the legislature would have said so. The body is required to be in continuous session, and it seems to me that a fair reading of the act will disclose that it is made its duty to exercise the powers conferred upon its own initiative. Otherwise, there would be no way to attain the results which are the express aims of the legislature. See *Re Davies*, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 118.

It is stated in the majority opinion that the assessment for the year 1917 was completed, reviewed, and equalized before the order was obtained, and the answer contains similar allegations. (It appears, however, that the amended petition was served in July before the equalization was complete.) A careful reading of the answer discloses that, though the defendants rely upon an assessment made by the local authorities as tending to defeat the jurisdiction of the tax commission, it is not stated that information of the character of that requested was ever supplied to the assessor or to any reviewing officer, and the answer shows that the agents of the tax commission were given access to the *physical* property of the defendant to enable them to determine *its* value. There is not the slightest suggestion in the record anywhere that any attempt has been made by any authority, other than the tax commission, to ascertain the facts upon which an assessment of the nonphysical property of the defendant electric company, if any, could be based; and the answer falls far short of any showing of willingness to make any disclosures of intangible property or of facts from which such intangible values, if any, might be determined. Yet it is said that there is no reasonable basis for an inquiry designed to uncover the facts upon which intangible values, if any, might be determined.

It is said in the majority opinion that the assessment for 1917 was complete, and that there was not even a suggestion in the petition or in the record that the assessor or any board of review had failed to per-

form his or its duty, or that property has escaped taxation, or that there has been any noncompliance with, or discovery of, any violation of the laws relating to assessment. Surely it is not expected that an administrative body exercising its powers in a capacity representing the state will proceed in the dark by presuming that other tax officers have been derelict in their duties. As I understand the Tax Commission Law, it is contemplated that the commission shall be first supplied with facts so that it may then determine whether other officers are proceeding in accordance with the law. It would be strange, indeed, if the legislature contemplated that the tax commission must first charge, without knowing, that other officers have failed to perform their duty. The majority opinion seems to me to border on absurdity in requiring a blind charge to be made as a condition of being permitted to obtain the information to substantiate the charge. The legislature has said what information the tax commission shall obtain, and it has not seen fit to impose such conditions. The majority seem to lose sight of the fact that the tax commission is a mere administrative agency, and not a judicial tribunal. The defendants are charged with nothing, and are not on trial,—perhaps not even suspected of being underassessed. They are merely asked and required to assist in the ordinary administration of the tax laws by supplying information which the legislature has deemed appropriate to that end. It is not for this court to characterize such proceedings as extraordinary. A proper respect for the legislative and executive branches of the government should rather lead to the conclusion that it is only the conduct of the defendants that is extraordinary. The record in this case shows quite conclusively that the necessity for a resort to a summons and subpoena duces tecum was occasioned by the refusal of the defendants to furnish the information upon request.

The condition of the law in this state, with reference to the assessment of property, does not justify the statement that the assessment of the defendant's property was complete for the year 1917. Subdivision 10 of § 2088, as amended by the legislature in 1917, chapter 232, authorizes the tax commission to make a reassessment in any year of all or any real or personal property, or either, in any assessment district, when, in the judgment of the commission, such assessment is desirable or necessary to the end that any or all property in such district shall be

assessed equally and in proper proportion to the taxes wherein such district is situated. The section provides in detail the procedure for reassessment, and under it there can be no question but what the tax commission would have had authority, even at the date when the order was obtained from the district court, to have caused a reassessment to be made of the property of the Hughes Electric Company which would have been effective for that year. The necessity for ordering a reassessment could not have been known to the tax commission except as it might appear from the facts which it was attempting to obtain. Furthermore, as was said by the supreme court of Indiana in the case of *Co-operative Bldg. & L. Asso. v. State*, supra: "It is not more inquisitorial in its nature to pry into the private affairs of a taxpayer by the examination of him and others after the original assessment lists have been made, than it is before or while they are being made." So, from the standpoint of the inquisitorial nature of this proceeding, it must, of necessity, be such if the facts which the legislature says should have a bearing upon the assessment are to be disclosed.

I am in hearty accord with the statement in the majority opinion that the lawmaking power is limited by constitutional restrictions, and that the legislature may not itself exercise nor confer upon an administrative body a general power of making inquiry into the private affairs of the citizen. It is elementary, however, that the 4th Amendment to the Federal Constitution only inhibits unwarranted searches and seizures by Federal officials, and that it has no application whatsoever to the action of the officers of the state. But it goes without saying that no tax system that depends for the efficiency of its administration upon disclosure by the citizens and taxpayers of their property can be efficiently administered without the exercise of a reasonable inquisitorial power.

It is also observed in the majority opinion that the statute under consideration makes no provision for granting immunity to those testifying before the tax commission, nor clothing their disclosures with secrecy. Of course, the failure to so provide enables the witness to fall back upon his constitutional privilege (*Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195), and the inquisitorial power cannot be so extensively exercised where such provisions are lacking. This being true, in a matter of this

character no witness could be required to give evidence incriminating him, nor be compelled to make disclosures that would amount to an unreasonable search into his private affairs (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370), and in so far as the order in the instant case might be thought to require a disclosure in excess of the needs of the tax commission in the exercise of its supervisory power, it should be modified so as to guard against any unreasonable compulsion. This is the most that should be done in this case, but, instead of doing this, the majority opinion excuses the defendants altogether from disclosing facts which, it is perfectly obvious, are essential to the performance of the official duties charged upon the petitioners.

It is proper to observe here that the information that the defendants are asked to disclose is protected to the same extent, no more and no less, when given to the tax commission, as when given to an assessor.

If the majority opinion be construed as holding that the petition is defective as not showing that there had been some formal complaint made to the commission, which was at the time under investigation, it goes to the extreme limits of technicality. The recital of the fact of a complaint, formal or informal, would add so little to the showing of reasonable grounds for the order, that I cannot believe the majority would hang the decision on so slender a thread.

In my opinion the order was entirely proper, is expressly authorized by § 10 of chapter 303 of the Session Laws of 1911, and should be affirmed.

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JESSIE LANGTON, Respondent, v. CHARLES KOPS, Appellant.

(171 N. W. 334.)

**Specific performance — contract for deed — performance of contract — tender of amount due — sufficiency of tender.**

Plaintiff brought action against the defendant to compel defendant to convey to plaintiff by warranty deed certain lands in pursuance to the terms of a certain contract for deed, the terms of which had been fully performed by the

plaintiff, and the provisions of which entitled him to a deed upon full performance of the conditions therein. Plaintiff tendered to defendant the full amount due on said contract on January 4, 1917, in the sum of \$2,253.94. Defendant claimed that the amount tendered was not sufficient to pay the balance due on the contract price of the land; *held* that the plaintiff's tender was sufficient in form and amount, and entitled him to the warranty deed for the land.

Opinion filed January 31, 1919.

Appeal from a judgment of the District Court of Ramsey County, Honorable *Frank E. Fisk*, Judge.

Affirmed.

*Frick & Kelly*, for appellant.

The declarations of an assignor after he has made the assignment and thus parted with his interest are not competent as against the assignee as admission, and this is true even though the action is brought in the name of the assignor if prosecuted for the benefit of the assignee. 1 Enc. Ev. p. 535, and cases cited.

The admission of grantors and former owners are not admissible against their grantees or those in priority of them if made after the grant. 1 Enc. Ev. p. 514, and cases cited.

The admissions of an indorser of notes made after the transfer are likewise inadmissible. *Bank v. Bank* (Ga.) 36 S. E. 265; *Eyerman v. Piron* (Mo.) 52 S. W. 299; *Zimmerman v. Kearney* (Neb.) 78 N. W. 336; *Pearce v. Stricker* (N. M.) 54 Pac. 748; *Wanger v. Grimm*, 169 N. Y. 421; 4 Enc. Ev. p. 93 and cases cited.

Where there is an agreement set out in the note for the payment of interest annually, or semiannually, the maker is chargeable with interest at the like rate upon each deferred payment of interest in like manner as if he had given a promissory note for the same amount. *Bledsoe v. Bixon*, 69 N. C. 89, cited with approval in *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594; *Ruloff v. Hunt* (Mich.) 83 N. W. 370; *Magruder v. De Haven* (Ky.) 52 S. W. 795; *Farm Inv. Co. v. Wyoming College*, 10 Wyo. 240, 68 Pac. 561; *Townsend v. Riley*, 46 N. H. 300; *Carpenter v. Welch*, 40 Vt. 251; *Hamilton County v. Chase* (Iowa) 152 N. W. 580; *Lowe v. Schuyler* (Mich.) 153 N. W. 786; 22 Cyc. 1509 and cases cited; Comp. Laws 1913, §§ 7193, 7197.

The mutuality of remedy required by statute is wholly lacking in this case. *Knudtson v. Robinson*, 18 N. D. 12; 39 Cyc. 1671, and cases cited.

In order to make a valid tender of either money or chattels the thing to be tendered must be actually produced and offered to the party entitled thereto. 38 Cyc. 143, and cases cited; Comp. Laws, §§ 5800, 5815; *Whittaker v. Roller Mills* (N. J.) 38 Atl. 289; 12 Enc. Ev. 483.

To prove a tender the evidence must be full, clear, and satisfactory, and it must be made in good faith. 12 Enc. Ev. 490, and cases cited. *J. C. Adamson*, for respondent.

GRACE, J. Appeal from a judgment of the district court of Ramsey county, North Dakota, Honorable Frank E. Fisk, Judge.

The action is one brought by the plaintiff against the defendant for specific performance to compel the defendant to convey to plaintiff by warranty deed to S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 1, township 156, range 60 West of the 5th principal meridian and containing 160 acres more or less according to the government survey thereof. The right to require specific performance and the conveyance by warranty deed of the land is based upon conditions and provisions of a certain contract for deed with reference to said land which will be more fully described hereafter and with the terms of which the plaintiff claims full compliance. On the 9th day of March, 1909, one Oliver Davidson entered into a contract for deed with one James H. Langton with reference to the land in question. The contract was recorded in the office of register of deeds of Ramsey county, North Dakota, March 5, 1913. The purchase price of the land was \$3,200, and was payable on or before five years from March 9, 1909. A promissory note for \$3,200, dated March 9, 1909, for the purchase price, and payable on or before five years after date, was executed by Langton to Davidson. On the 24th day of October, 1913, Davidson conveyed the land by warranty deed to Charles Kops subject to the contract. On the 8th day of August, 1912, James H. Langton made a written assignment of his interest in the contract to Lovina Langton. On the 17th day of March, 1916, Lovina Langton, then Lovina Hutchinson, and Mark Hutchinson, her husband, by warranty deed sold and conveyed all her

right, title, and interest in the contract and the land to the plaintiff. The following payments were made upon the contract by James H. Langton and the plaintiff herein:

November 3, 1909 .....	\$576.80
December 18, 1911 .....	411.94
In 1912 .....	163.27
December 18, 1912 .....	500.00
December 18, 1913 .....	161.00
February 14, 1916 .....	522.00

January 4, 1917, tendered as the balance due upon the contract at that date, in the sum of \$2,253.94.

There is really but a single question presented in this case, namely: Was the sum \$2,253.94 tendered to defendant by plaintiff on January 4, 1917, equal to the amount due on the contract at that date? The defendant, for two reasons, claims it was not. First, that the payment of \$163.27, paid in 1912 for the purpose of taking up two interest coupons on a certain mortgage which was against the land and which was about to be foreclosed by reason of the nonpayment of such interest coupons, were not a proper credit in plaintiff's favor and not chargeable to the defendant. It appears from the record that it was the duty of Davidson to have paid the interest coupons. He did not do so, and in order to prevent a foreclosure, James H. Langton, to whom Davidson had issued the contract for deed for the land, paid the interest coupons and charged the amount to Davidson. This was before the land was deeded to Kops by Davidson and was a proper charge in Langton's favor against Davidson, and entitled him to credit in that amount on the contract at that time. Kops took the deed to the land from Davidson subject to the contract of deed and subject to any rights of Langton. He took it, therefore, subject to the credit of \$163.27, paid to take up the interest coupons paid by Langton to prevent foreclosure of the mortgage which it was first the duty of Davidson to have paid. Under these circumstances, the \$163.27 was properly credited as a payment on the contract.

The remaining question relied upon by defendant is that he is entitled to charge interest on the annual interest after it became due and



payable. Assuming this to be true, we are of the opinion that the amount tendered January 4, 1917, was sufficient to discharge the amount owing defendant on the contract on that day. The purchase price was secured by retaining a lien on the crops raised on the land during each year. A portion of the crops was turned in in each of several years, with the exception of 1914, and applied in reduction of interest due on the contract, and the balance applied to reduction of principal. The payment on February 14, 1916, of \$522 was undoubtedly proceeds from the crop 1915. January 4, 1917, the full amount was tendered so that it included all that was due upon the contract at that time. We think it was the intention of the contract to have a portion of the crop of each year applied to the discharge of the sum which remained owing upon the contract each year during the life of the contract, and when the contract is so construed, the amount tendered on January 4, 1917, would be sufficient to pay the balance due upon the contract. This conclusion, as we view it, is also the most favorable to the defendant. If the contract were construed as defendant contends it should be, we believe the amount tendered on January 4, 1917, would be more than would actually be due upon the contract. For instance, the whole purchase price was due five years from the date of the contract, the purchase price being evidenced by the promissory note for \$3,200. The time of the payment of the note was extended to some time in 1918. All that Langton or the plaintiff was compelled to pay in any year on the contract before its maturity according to the strict terms of the contract was the interest on the whole amount, which amounted to \$224 per year. If, for instance, Langton had paid \$224 interest on the 9th day of March, 1910, he would have nothing more to pay until the 9th day of March, 1911, when he again would pay the interest, and so on from year to year during the five-year period or any further period to which the time of payment of the note was extended. If it be assumed, as defendant claims, that he is entitled to annual interest, and, if any annual interest is not paid when due, is entitled to interest thereon, the amount tendered still would be sufficient to pay the full amount due on the contract January 4, 1917; for, if Langton or the plaintiff had paid the annual interest in the manner claimed by defendant and had taken the balance of the payment made in any given year and placed it at interest at the same rate the

contract drew, the aggregate of such interest on each of the excess payments in the different years until the time of final payment of the contract and note, it would aggregate a very considerable amount on January 4, 1917. In other words, if the contract were construed as defendant wishes it to be, the only amount he is entitled to recover in any given year is the annual interest until the time of the final settlement. The plaintiffs would be entitled to charge interest on any payments over and above the annual interest from the time such payment was made until the time of final settlement on January 4, 1917. It is quite evident if this were done, the amount tendered is not only sufficient, but, we believe, in excess of the amount actually due upon the contract on January 4, 1917. However, we believe the method of payment adopted by Davidson and Langton and the method of computing the interest should prevail. The plaintiff is not complaining in regard to that method, and, as we view it, the defendant certainly cannot. By the strict terms of the contract, there were no particular payments to be made each year of the contract. However, it does appear from the contract that Langton and therefore the plaintiff had the right to pay more on the contract each year than the crops amounted to. The contract is somewhat vague in this regard. We quote a portion of the contract:

"It is virtually understood and agreed by and between the parties hereto that the annual payment to be made on this contract shall be made out of the proceeds of one half of all crops grown on the within-described land during the continuance of this contract or until the full amount shall have been paid. Further, that the party of the second part shall have the right and privilege to pay as much more than the proceeds of one half of all crops as he shall elect during each and every year of this contract. It is especially understood and agreed between the parties hereto that the party of the first part shall be entitled to two-thirds share of said crops during the season of 1909."

From this, it appears that Langton or his assignee had the right to apply one half of the crop from the land each year upon the amount owing upon the contract. We think if the crop were harvested and threshed the application of one half the crop, or more, if Langton or his assignee desired, might be paid upon the contract any time during that year and they could do likewise each year during the life of the

contract. This, in fact, was the method pursued by Langton and Davidson and by plaintiff, Langton's assignee, though the whole purchase price was not payable for five years from March 9, 1909, and later a further extension of the time of the \$3,200 note was made in writing. Where partial payments are so made, the rule commonly known as the United States rule is generally applied. That rule is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period of time when the payments, taken together, exceed the interest then due to discharge which, they are applied, and the surplus, if any, is to be applied towards the discharge of the principal, and the interest is to be computed on the balance as aforesaid, and this process continues until final settlement. This is, substantially, the rule which was used by plaintiff in making the computation by which they arrived at the amount which was tendered on January 4, 1917. Most of the decisions of the various states follow this rule. The rule was first laid down by the United States Supreme Court in *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *Woodward v. Jewell*, 140 U. S. 247, 35 L. ed. 478, 11 Sup. Ct. Rep. 784. There are a few cases, however, that follow what may be termed the "mercantile rule." That rule is to compute the interest on the principal debt until maturity or any given time, and the interest on payments made from the time when made until such time, and then deduct the sum of the one from the other. We believe the defendant has rather invoked the mercantile rule, or at least a part of it. If he desired to do so, he should have figured annual interest for the whole time and then interest on annual interest for the time remaining past due and then interest on the payments from the time they were made until the time of settlement, and then deduct one amount from the other. If this had been done, we believe that the amount tendered January 4 would have been found to have been too large. The plaintiff, however, is not complaining and is satisfied with the method of computation which was used in determining the amount which was claimed to be due on January

4, 1917. This amount was arrived at by the application, we believe, of the method of casting interest known as the United States rule, or substantially that rule, and this being a fair method and one recognized generally by the courts, including the United States Supreme Court, we think it is fair and the conclusion reached should not be disturbed.

The judgment of the District Court is affirmed, with the statutory costs.

CHRISTIANSON, Ch. J., and BRONSON, J., concur in result.

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LAWRENCE F. RHEA, by His Guardian *ad Litem*, William F. Rhea, Appellant, v. BOARD OF EDUCATION OF DEVILS LAKE SPECIAL SCHOOL DISTRICT, a Corporation, Respondent.

(171 N. W. 103.)

**Schools and school districts—board of health—right to attend public schools—vaccination.**

1. Section 400 of the Compiled Laws of 1913, making it the duty of the board of health to make and enforce all needful rules and regulations for the prevention and cure of contagious and infectious diseases, is construed and *held* not to authorize the board of health to issue an order denying to children the right to attend the public schools except upon condition of being vaccinated, where it appears that there is no prevailing epidemic of smallpox and no imminent danger from this disease is reasonably to be anticipated.

**Schools and school districts—exclusion from school.**

2. Sections 1346 and 426 of the Compiled Laws of 1913, defining the duties of school officers with reference to the supervision of the health of school children and their exclusion from schools when infected with infectious or contagious diseases, are construed and *held* not to authorize the exclusion for nonvaccination, in the absence of a showing of danger due to the existence of smallpox in the community, or that such danger is reasonably imminent.

**Schools and school districts—vaccination of minors—exclusion from schools.**

3. Section 425 of the Compiled Laws of 1913, which provides for the vaccination of minors, and § 426, which enumerates the causes for which children may be excluded from schools, among which nonvaccination is not included, are  
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construed together, and it is *held* that the reasonable construction is that children are not to be excluded from schools on the sole ground of nonvaccination.

Opinion filed January 31, 1919.

Appeal from the District Court of Ramsey County, Honorable C. W. Buttz, Judge.

Reversed and a writ of mandamus awarded.

G. W. Young, W. M. Anderson, and Fred. H. Hartwell, for appellant.

In the absence of any statute making vaccination a condition precedent to the right of admission to the public schools, neither a board of health having general control of matters affecting the public health, nor a school board, acting under its general power or under the board of health, has authority to exclude children from the public schools where smallpox does not already exist, or is reasonably apprehended. *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81; *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850; *Trustees v. McMurtry*, 169 Ky. 457, 184 S. W. 457; *Mathews v. Kalamazoo Bd. of Edu.* 127 Mich. 530, 86 N. W. 1036; *State v. Burdge*, 95 Wis. 390, 70 N. W. 347; *Osborn v. Russell*, 64 Kan. 507, 68 Pac. 60; *Glover v. Board of Education*, 14 S. D. 149, 84 N. W. 761; *School Directors v. Breen*, 60 Ill. App. 201, affirmed in 167 Ill. 67; *People v. Board of Education*, 234 Ill. 422, 84 N. E. 1046; Inferentially in *Hill v. Bickers*, 171 Ky. 703, 188 S. W. 766; *Board of Trustees v. McMurtry*, 169 Ky. 457, 184 S. W. 390; *State v. Turney*, 31 Ohio C. C. 222; *Waldschmidt v. New Braunfels*, 193 S. W. 86, 1077.

*William Langer*, Attorney General, *George K. Foster*, Assistant Attorney General, *Cuthbert & Smythe* and *Rolla F. Hunt*, State's Attorney, for respondent.

The motion to quash the alternative writ may be made after the answer and return to the petition and writ have been made, without withdrawing the answer and return. 26 Cyc. 463, note 68; High, Extr. Leg. Rem. § 521; *Commercial Bank v. Canal Comrs.* 10 Wend. 26; *Haskins v. Scott County*, 51 Miss. 406.

The court will take judicial notice of the fact that the term "vaccinated" used in § 425, C. D. 1913, means inoculated with the virus

of cow pox is a prophylactic against smallpox. *Lee v. Marsh*, 230 Pa. 351, 79 Atl. 564; 4 Words & Phrases, 2d Series, title "Vaccination."

Courts will take judicial notice as a matter of common knowledge that a great majority of medical writers and practitioners advocate vaccination, and that vaccination is commonly believed by the people of the state to be a preventive of smallpox. *Re Viemeister*, 179 N. Y. 241, 70 L.R.A. 799, 103 Am. St. Rep. 862, 72 N. E. 99; *Auten v. Board of Directors of Special School Dist. (Ark.)* 104 S. W. 130; *State v. Hay*, 126 N. C. 1003, 49 L.R.A. 589, 35 S. E. 461.

Statutes requiring compulsory vaccination are a valid exercise of the police power. *Jacobson v. Massachusetts*, 197 U. S. 31, note; 3 *Bouvier's Law Dict.*, title Vaccination; 1 *American Dig.* title Vaccination; 22 *New International Enc.* p. 842; *Re Viemeister*, 179 N. Y. 239, 70 L.R.A. 798, 72 N. E. 99, 103 Am. St. Rep. 860; *Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. ed. 346, 352; *Watertown v. Nayo*, 109 Mass. 318; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Watertown v. Mayo*, 109 Mass. 315; 12 C. J. §§ 333, 390, 425, pp. 848, 913; *Morris v. Columbus*, 102 Ga. 796, 42 L.R.A. 178, 30 S. E. 850, 66 Am. St. Rep. 247; *Abcel v. Clark*, 84 Cal. 226, 24 Pac. 383; *French v. Davidson*, 143 Cal. 658, 77 Pac. 663; *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873; *Stull v. Reber*, 215 Pa. 156, 64 Atl. 419; 7 *Ann. Cas.* 415.

The granting of power to the state board of health to order school children to be vaccinated is not an improper delegation of legislative power. *Neer v. State Live Stock Sanitary Bd. (N. D.)* 168 N. W. 605; *Blue v. Beach*, 155 Ind. 132, 50 L.R.A. 69, 56 N. E. 93, 80 Am. St. Rep. 194, 204, 205; citing *Cooley*, Const. Lim. 114; *State v. Chittenden*, 127 Wis. 515, 107 N. W. 516; *Dowling v. Lancashire, Ins. Co.* 92 Wis. 70, 31 L.R.A. 114, 65 N. W. 739; *Adams v. Beloit*, 105 Wis. 368, 47 L.R.A. 444, 81 N. W. 870; *Angellus v. Sullivan*, 158 C. C. A. 280, 246 Fed. 60; *United States v. Sugar*, 243 Fed. 423. See also *Re Griner*, 16 Wis. 423; *Cook v. Burnquist*, 242 Fed. 329; *United States v. Cudahy Packing Co.* 243 Fed. 441; *State v. Turner*, 37 N. D. 635, 164 N. W. 924.

It is not necessary that an epidemic exist to make the vaccination order valid. *Westlake v. Anderson*, 33 N. D. 330, 156 N. W. 927; *State v. Normand*, 76 N. H. 541, 85 Atl. 899, *Ann. Cas.* 1913E, 996;

State v. Morse, 84 Vt. 387, 34 L.R.A.(N.S.) 190, 80 Atl. 189; 2 Ann. Cas. 427, note; 3 Ann. Cas. 350, note.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Ramsey county, which dismisses the appellant's action, quashes an alternative writ of mandamus, and awards costs to the defendant. Although an answer was filed and stipulation entered into by the respective parties, covering certain of the facts alleged, the matter was finally brought to a hearing before the lower court on a motion to quash the alternative writ of mandamus. The correctness of the judgment entered must therefore depend upon the sufficiency of the amended petition of the plaintiff and appellant.

The proceedings were instituted by William F. Rhea, guardian *ad litem* of his son, Lawrence F. Rhea; the latter, at the time the suit was instituted, being a schoolboy thirteen years of age. The defendant is the school corporation of the special school district of the city of Devils Lake. The petition alleges all facts necessary to entitle the plaintiff to attend the public schools maintained by the defendant, unless his exclusion on the ground that he had not been vaccinated be lawful. The facts concerning his exclusion are alleged as follows:

"That on or about the month of July, 1917, the state board of health of the state of North Dakota, without any legal or other authority, attempted to pass and make and issued an order fixing and placing the time of vaccinating children, and directing that all school directors and teachers be and they were thereby ordered to enforce this regulation in their respective districts by requiring every pupil to give to certain authorities satisfactory evidence of vaccination before permission be granted to attend school.

"That said state board of health on or about November 21, 1913, without any legal or other authority so to do, attempted to pass and make and issued the following rule and order, to wit: 'No child shall be permitted to enter any school in the state until satisfactory evidence of vaccination has been given to the proper authorities.' That said rule and order applies to and covers pupils of other schools in the state of North Dakota besides and other pupils than the pupils attending the public schools. . . .

"That the board of education of said Devils Lake special district,

claiming to act under and pursuant to the above-attempted and illegal rules of the state board of health, have unlawfully made an order, without authority, applicable to all the public schools of said Devils Lake special school district, requiring that all pupils shall be vaccinated before being admitted to such schools, and shall present a certificate of successful vaccination to the superintendent or teacher in charge before being admitted as pupils, and have unlawfully and without authority ordered that the superintendent of such public school refuse admission and to impart no instruction to children of proper school age until they shall first have complied with said order."

It is further alleged that the plaintiff is in sound bodily health, and has never been exposed to the infection or either smallpox or varioloid; that, at the time the order of exclusion was promulgated and enforced against him and for a long time past, there was and had not been a case of smallpox within the Devils Lake special school district; that the disease had never been epidemic within the state of North Dakota; and that there was no reason to apprehend the appearance of smallpox in the defendant district.

The authority upon which the defendant relies to support its action in excluding the plaintiff from attendance upon the school is found in the sections of the Code which contain the expression of the powers of the state board of health and of school boards, and which require parents and guardians to have minors under their control vaccinated. Section 400 of the Compiled Laws of 1913 makes it the duty of the board of health: "3. To make and enforce all needful rules and regulations for the prevention and cure, and to prevent the spread of any contagious, infectious, or malarial diseases among persons and domestic animals." By § 1346, Compiled Laws of 1913, the boards of all school corporations are authorized to employ physicians as medical inspectors, and it is made the duty of the medical inspector to "co-operate with state, county, and township boards of health in dealing with contagious and infectious diseases." Section 426 of the Compiled Laws of 1913 makes it the specific duty of principals, superintendents, teachers, parents, and guardians of children to refuse to permit any child having any contagious or infectious disease, including smallpox, to attend any public or private school. Also to refuse such permission to any child residing in any house in which any such disease exists or has recently



existed. Section 425 of the Compiled Laws of 1913 is as follows: "Each parent or guardian having the care, custody, or control of any minor or other person shall cause such minor or other person to be vaccinated." Section 433, Compiled Laws of 1913, declares any person not complying with the provisions of the article, of which § 425 is a part, to be guilty of a misdemeanor and punishable by a fine of not less than \$10 nor more than \$50, or imprisonment in the county jail, or both.

Other provisions of the Constitution and the statutes bearing upon the case are those defining the public policy with reference to free schools and compulsory attendance. Section 147 of the Constitution makes it the duty of the legislative assembly to provide "for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control." Section 1343, Compiled Laws of 1913, makes all public schools "at all times equally free, open, and accessible to all children over six and under twenty-one years of age residing in the district." Section 1342, Compiled Laws of 1913, provides for compulsory attendance of children between the ages of eight and fifteen, and § 1344, Compiled Laws of 1913, penalizes parents, guardians, and other persons failing to comply with the preceding requirements.

The question for our determination is whether or not, under the foregoing statutes, the board of education of Devils Lake was legally justified in excluding the plaintiff from the schools on the ground that he had not been vaccinated. While the researches of counsel and our own investigations have failed to disclose the existence of any direct authority upon the exact question presented under the facts in this case, it appears that there are ample precedents for the principles which we deem controlling. Boards of health and boards of education possess only such powers as the statutes confer upon them. The power to legislate cannot be delegated to them, but when the legislative policy is determined by the competent legislative authority ample administrative powers may be vested in executives or boards to the end that the legislative rule may be properly enforced. *Marshall Field & Co. v. Clark*, 143 U. S. 650, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347.

There being no statute in this state making vaccination a condition precedent to the right to attend the public schools, we are not confronted with the question of the constitutionality of such a statute, and it is consequently improper to express an opinion concerning the same. We are only called upon to determine the meaning and scope of the statutory provisions previously referred to. Bearing in mind the rule that statutory boards possess only the authority vested in them, the maxim "*expressio unius est exclusio alterius*" applies with peculiar force where a statute, while clearly defining a duty to exclude pupils from schools on the ground of the danger of spreading contagious and infectious diseases, does not include nonvaccination as a ground for exclusion. This statute, § 426, Comp. Laws 1913, predicates the exclusion either upon the ground that the pupil is infected or that he comes from an infected habitation. It would seem, if it were intended that nonvaccination should be considered a reason for withholding permission to attend schools, that it would be included in any enumeration of the grounds for exclusion in a statute such as § 426, *supra*. This appeals with peculiar force here, as the compulsory vaccination statute is the immediately preceding section of the same chapter, both being adopted at the same time. See Sess. Laws 1893, chap. 90, §§ 13 and 14. We are of the opinion that the failure to include nonvaccination as a ground for excluding a pupil from attendance at school, in § 426, Compiled Laws of 1913, is a strong indication that such a power was not intended to be given, either to the board of health or a board of education.

But it is contended that, since § 425 of the Compiled Laws of 1913 requires the vaccination of minors generally, it was proper for the state board of health to promulgate an order which would not affect adversely, anyone who had complied with the statute. The failure to comply with the compulsory vaccination statute results in making the one who thus fails guilty of a misdemeanor and subjects him to the prescribed punishment. It is not particularly the function of the board of health to compel compliance with this statute. The board is not the public prosecutor. Even the public prosecutor could not compel vaccination. He can only punish for violations of the statutes, and to exclude one from school on the same ground would be to add a penalty not included in the statute. The powers of the board of health are limited to

such *needful* rules and regulations as may be required for the prevention and spread of contagious and infectious diseases, and the fact that the legislature has purported to make vaccination compulsory does not add to or subtract from the scientific data upon which the board of health may determine whether or not a proposed rule or regulation is "needful." The authorities uniformly hold that a board of health, constituted as our board of health is, possessing requisite general powers for the prevention and spread of contagious diseases, cannot promulgate and enforce rules which merely have a tendency in that direction, but which are not founded upon any existing condition or upon a danger not reasonably to be apprehended. *Potts v. Breen*, 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850; *People ex rel. Jenkins v. Board of Education*, 234 Ill. 422, 17 L.R.A.(N.S.) 709, 84 N. E. 1046, 14 Ann. Cas. 943; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *Blue v. Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Mathews v. Kalamazoo Bd. of Edu.* 127 Mich. 530, 54 L.R.A. 736, 86 N. W. 1036. In an apparently contrary authority in North Carolina, *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 46, 2 Ann. Cas. 340, it nevertheless appeared that the general powers were exercised during a violent epidemic.

The authorities principally relied upon by counsel for the respondent will be found to sustain one of two general propositions with which we are not concerned in the instant case. They either support the right of a board of education or a board of health to make vaccination a condition of attendance at school where there is an express statute or ordinance to that effect, as in *State v. Hay*, 126 N. C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Morris v. Columbus*, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *Re Viemeister*, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334; *People v. Ekerold*, 211 N. Y. 386, L.R.A. 1915D, 223, 105 N. E. 670, Ann. Cas. 1915C, 552; *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L.R.A. 152, 29 Atl. 742; *Bissell v. Davison*, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348; *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; *Stull v. Reber*, 215 Pa. 156, 64 Atl. 419, 7 Ann. Cas. 415; *State ex rel. McFadden*

v. Shorrock, 55 Wash. 208, 104 Pac. 214; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; and French v. Davidson, 143 Cal. 658, 77 Pac. 663; or they support the right of such boards to exercise the power to compel vaccination or exclusion as a means of controlling and preventing the spread of the disease during an actual or reasonably imminent epidemic, as in *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Blue v. Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *State ex rel. Freeman v. Zimmerman*, 86 Minn. 353, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783; *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 22 L.R.A.(N.S.) 986, 119 S. W. 424; *Glover v. Board of Education*, 14 S. D. 139, 84 N. W. 761; *Zucht v. San Antonio School Bd.* — *Tex. Civ. App.* —, 170 S. W. 840; *State ex rel. Cox v. Board of Education*, 21 Utah, 401, 60 Pac. 1013, and *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 46, 2 Ann. Cas. 340. See also L.R.A.1915D, 223, note. We are in no wise disposed to question the latter of these two propositions; and, since the former involves a constitutional question not presented in this case, judicial propriety requires that we should refrain from expressing an opinion.

For the foregoing reasons the judgment appealed from is reversed.

ROBINSON, J. (concurring). The nonvaccination of children—is it a cause for excluding them from the public schools in a state where smallpox does not prevail, and where the sickness and death resulting from vaccination would far exceed that now resulting from smallpox—that is the question. We must consider not only the statutes, but also the origin and nature of smallpox. It is a disease which originates in filth, the crowding of people together, the lack of pure air, good food, and good sanitary conditions. It prevails and becomes epidemic only in countries where the population is dense and the sanitary conditions are bad. It was in such countries, and in days when sanitation was unknown, that the doctrine of vaccination was promulgated and adopted as a religious creed. Gradually it spread to other countries where conditions are so different that vaccination is justly regarded as a menace and a curse; and where, as it appears, the primary purpose of vaccination is to give a living to the vaccinators. In this great

Northwest the disease has never prevailed to any considerable extent, and it has never become epidemic. Hence, were vaccination to become general, it would be certain to cause sickness or death of a thousand children where one child now sickens and dies from smallpox. Of course a different story is told by the class that reap a golden harvest from vaccination and the diseases caused by it. Yet, because of their self-interest, their doctrine must be received with the greatest care and scrutiny. Every person of common sense and observation must know that it is not the welfare of the children that causes the vaccinators to preach their doctrines and to incur the expense of lobbying for vaccination statutes. Certain it is that in this sparsely settled prairie country, vaccination is not necessary to prevent the spread of smallpox or pig cholera. And if anyone says to the contrary, he either does not know the facts, or he has no regard for truth.

England, with its dense population and unsanitary conditions, was the first country to adopt compulsory vaccination, but there it has been denounced and abandoned. In the city of Leicester vaccination has long since been tabooed, and there, because of special regard for cleanliness and good sanitation, the people fear no smallpox. But in Prussia, Germany, and other such countries, the light shineth in darkness and the darkness comprehendeth it not.

In the book of Dr. Peebles on vaccination there are statistics to the effect that 25,000 children are annually slaughtered by diseases inoculated into the system by compulsory vaccination. It is shown beyond doubt that vaccination is not infrequently the cause of death, syphilis, cancer, consumption, eczema, leprosy, and other diseases. It is shown that if vaccination has any tendency to prevent an attack of smallpox, the remedy is worse than the disease.

Smallpox is the least dangerous of the infectious diseases. With proper care no person dies of smallpox, and the disease gives the patient and his descendants more or less immunity from other diseases. It commences with a fever and takes the patient to bed several days before the disease becomes infectious. Its infectious character commences (as the fever subsides) with the formation of small, peculiar cutaneous eruptions or pustules all over the body, and these emit the offensive smelling infection. At the close of three or four weeks, with proper care, the patient recovers and becomes hale and hearty, with an im-

munity from the disease. It is true that smallpox and other infectious diseases do not prevail as much as formerly, but that is not due to vaccination. As time passes sanitary conditions improve; men and animals become more and more immune. Nature is everywhere working and learning by slow degrees to protect both the animal and the vegetable. The pig that has survived an attack of cholera is immune, and for several generations its breed is partly immune. In some southern countries where pigs are kept in a filthy condition or live on droppings from cattle, they are very subject to cholera, and there pig vaccination and inoculation may be a proper sanitary measure; but in a northern state, where the pig has a good pasture, a good wallow, and is well fed and housed, there is no pig cholera and hence pig vaccination would be a barbarism. Indeed, the pig growers would rebel against it; and so of child vaccination in a state where smallpox does not prevail, it has no excuse; it is a barbarism. It is the duty of child growers to rebel against it. Surely the child should have as much protection as the pig.

The question is to be decided on the fundamental law, the statutes, common knowledge, and pure reason.

By the Constitution the public schools must be open to the children of the state. § 147. But when a child has an infectious disease or resides in an infected house, then it may not attend the schools. § 426. By an obsolete statute every minor person must be vaccinated, not excepting those who have had the smallpox. § 425. And by a general order the state board of health has tried to amend the Constitution and the statute so as to exclude from the schools a child that is not vaccinated. Its power is only "to make needful rules to prevent the spread of infectious diseases among persons and domestic animals." § 400. It has no power to amend either the Constitution or the statute, or to add to or take from the same, one jot or tittle.

In Egypt, Palestine, and other semitropical countries, under conditions which prevailed three thousand years ago, circumcision was accounted a sanitary measure, and not merely a religious rite. But now there is no such reason for circumcision, for pig or child vaccination, under the conditions here prevailing in this twentieth century. We live in a sparsely settled northern country under a Constitution which guarantees personal liberty, and the right of every per-

son to pursue and obtain safety and happiness, and the right of every child to attend the public schools. If it be conceded that vaccination is a safe preventive of a bad disease (and it is not), still children do not cry for it, and it has not yet become a religious rite. Vaccination has never prevented any child from carrying to school the infection of smallpox. The disease at once takes a child to bed and prevents it from going to school.

In writing a judicial opinion it is customary to fortify it by a reference to authorities, that is, to decisions in similar cases, but here it is not possible because all the judicial decisions have been given under different statutes and conditions. In Europe, Asia, Africa, and in the Atlantic and Pacific states the conditions are so different that there vaccination may be good thing, while in this great Northwest it might prove a veritable curse.

In *Com. v. Jacobsen* (1903) 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, it was held by the supreme court of Massachusetts, and by a majority of the United States Supreme Court, that vaccination may be required of all the inhabitants of a state where smallpox is prevalent and increasing. 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

The New York court of appeals has sustained a statute excluding from schools all children not vaccinated. *Re Viemeister*, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334. And so it has been held in Pennsylvania and in several other densely populated states. It is quite remarkable that judicial decisions do commonly run in the ruts of ages, regardless of changing conditions. Thus some two hundred years ago, in Massachusetts, because of custom and because it is written: Thou shalt not suffer a wizard to live, judges were found ready to convict and sentence the poor women, who were burned for witchcraft. In every age and country some judges have been too ready to follow the example of Pontius Pilate,—to wash their hands,—and to blame a supposed law or a precedent for their unjust decisions.

In Illinois it is held that the legal right of a child to attend the public school may not be denied unless in localities where smallpox prevails. *Potts v. Breen*, 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81.

In 1908, under a statute giving the city of Chicago power to make all regulations and pass all ordinances necessary and expedient for the promotion of the public health or the suppression of disease, the city passed an ordinance excluding children from the public schools unless vaccinated, and it was held null and void. *People ex rel. Jenkins v. Board of Education*, 234 Ill. 422, 17 L.R.A.(N.S.) 709, 84 N. E. 1046, 14 Ann. Cas. 943.

Finally the proper safeguard is by sanitation. The chances are that within a generation vaccination will cease to exist. It will go the way of inoculation, bleeding, purging, and salivation. The vaccinators must learn to live without sowing the seeds of death and disease.

Order reversed. Mandamus awarded.

COLE, District Judge. I dissent. It seems to me that the majority opinion in this case is straining very hard at statutory construction that absolutely kills the intent and purpose of the statute, the purpose of the legislative body.

Stress is laid upon the word "prevention" in the majority opinion, and the word "cure" used in connection therewith. It seems to me that the majority opinion has not given proper attention to the definition of the word "prevent" or "prevention." This is defined in the different dictionaries and given a very specific and well-understood meaning, and it has also been defined by judicial opinion. In the case of *Green v. State*, 109 Ga. at page 536, 35 S. E. 97, 12 Am. Crim. Rep. 542, also the citation above on page 5545 of *Words & Phrases*, vol. 6, the following definition is given: "'Prevent' means to intercept; to hinder; to frustrate; to stop; to thwart; to hinder from happening by means of previous measures; keep from occurring or being brought about as an event or result; ward off; preclude; hinder, as to prevent the escape of a prisoner; to stop in advance from some act or operation; intercept or bar the action of; check; restrain. As used in an indictment charging that the accused persons did, in a violent and tumultuous manner, prevent the sheriff from doing a certain act, embraces the idea that the accused persons necessarily committed an act of some character."

On the same page in the same volume of *Words and Phrases* the definition given to "prevent" is also quoted from the case of *Ex*



parte Florence, 78 Ala. 419, 421: " 'Prevent,' as used in Acts 1878-79, p. 413, conferring power on the municipal authorities of a city to prevent the selling of spirituous . . . liquors within the corporate limits whenever they may deem it expedient, is synonymous with 'prohibit.' The difference between 'prevent' and 'prohibit' is not material. If there is any difference, 'prevent' is the stronger word,—conveying the idea of prohibition, and the use of the means necessary to give it effect."

It will be seen from the judicial definitions, herein cited, and from an examination of the definitions of the word "prevent" in the different dictionaries, that "prevention" means immunity, and not "cure," and in defining our statute this effect should be kept in mind.

Subdivision 3 of § 400 of the Compiled Laws of 1913 is as follows: "To make and enforce all needful rules and regulations for the prevention and cure, and to prevent the spread of any contagious, infectious, or malarial diseases among persons and domestic animals."

The first effect of this subdivision makes prevention one of the important features of the statute, and prevention means herein prohibition, and prohibition necessarily means immunity, else the purpose of the word would be largely meaningless. It should also be borne in mind that statutes are to be given a broad construction so as to carry out what is evidently the intent and purpose of the people and the legislative body.

All through the statutes of this state run this idea and this provision, that is to say, in substance, that the rule of common law that statutes in derogation thereof are to be strictly construed have no application to our Codes, and that our Codes are to be construed liberally with the purpose of effecting what was the evident intent and purpose of the legislative body as representing the people. When the board of health is given power to prevent contagious diseases, prevention being used in the statute, it means the board is given power to provide immunity against the disease coming into the several communities, or into the state itself. If this be not so then the word "prevention" is subordinate to the word "cure," and would not operate at all to prohibit or prevent the coming in of contagious diseases, but would simply mean that, after the contagious disease once came into the community, it should be prevented from multiplying or becoming greater and more

dangerous in its effect than it was or would be at the time that the board of health should make its order.

Such seems to me to be the result of the reasoning by Judge Birdzell, especially under the well-defined judicial definition of the word "prevent," and also the definition of the same word in the several dictionaries. If I am right in my construction clearly the statute is intended to give the board of health power to prevent the attendance at public schools of pupils who cannot show that they have been vaccinated unless some reputable physician certifies that their physical condition is such that it would be dangerous for them to be vaccinated. I am clearly and emphatically of the opinion that Judge Birdzell is entirely in error when he says the constitutional question is not before this court, and it would be improper for us to consider that. Surely it was urged in argument and in the briefs, and it seems to me it necessarily follows as a part of the matter before the court under the definition that I have given to the word "prevent" as used in our statute, and besides this the Constitution of the state provides in § 101 that every point fairly arising upon the record of the case shall be considered and decided by the supreme court, and that the reasons therefor shall be concisely stated in writing. Surely in the arguments and in the briefs of counsel and with the entire matter before the court, in construing these statutes and the order of the board of health, the constitutionality of the power or supposed power of the board of health and the school authorities at Devils Lake are involved, and should have a decision from this court in this case, and more especially as it will tend to prevent future litigation and encumbering of trial courts as well as the supreme court with unnecessary hearings and unnecessary determinations.

I am clearly of the opinion that it is the duty of this court to avoid rendering a decision merely upon some point which may reverse or affirm the case, and not decide the whole matter at issue before it. Litigation is multiplying rapidly, and the courts are being encumbered throughout our state and every subdivision of the state, and it is the duty of the highest judicial tribunal in each state to decide every matter that it fairly can take hold of in any decision that comes up before it for review.

As I have noted before, vaccination is a matter of immunity and a

matter of prevention, and prevention and immunity are allied in the purpose and intent of the statute. Besides the act that is compulsory as to parents to have their children vaccinated naturally means that the legislative body deemed it necessary to have vaccination, and § 425 of the Compiled Laws of 1913, being broad and covering not only parents, but as well guardians who have the care, custody, or control of minors, shall cause such minors to be vaccinated, certainly means that the minor should be vaccinated before he is permitted to go to school, because it cannot but mean that the minor should be vaccinated before he is permitted to go to school, or to go at large among the people, although he is not so prevented even though not vaccinated. A reasonable construction should be given to each statute so as to give it full force and effect, and it would be unreasonable to construe out of the statute this provision for the vaccination of a minor a meaning that would say that, because in express language it does not provide that children may not be permitted to attend school without being vaccinated, therefore such order cannot be made a part of the preventive orders which the boards of health are allowed to promulgate.

I desire to note at this time a few decisions of importance in connection with the present case. In the case of *Bissell v. Davison*, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348, it is intimated that the enforcement of the vaccination statute is not dependent on the actual presence of reasonable apprehension of smallpox.

In the case of *Stull v. Reber*, 215 Pa. 156, 64 Atl. 419, 7 Ann. Cas. 415, it is said it is no ground for the issuance of an injunction restraining the enforcement, in the schools of a given community, of a statute requiring the exclusion from the public schools who have not been vaccinated, that the community has enjoyed immunity from smallpox for a period of forty years.

The case of *State v. Hay*, 126 N. C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S. E. 459, is a case of great interest considered in connection with the case at bar, and should be read by the court.

The case of *Streich v. Board of Education*, 34 S. D. at page 169, L.R.A.1915A, 632, 147 N. W. 779, Ann. Cas. 1917A, 760, is of interest in connection with the case at bar, although not directly in point.

The case of *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643,

25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, states that judicial notice will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority. See also in this connection Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 349, 75 N. E. 404, 3 Ann. Cas. 263, wherein the foregoing case is cited and approved. Also Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842, and also New York ex rel. Lieberman v. Van De Carr, 199 U. S. 558, 50 L. ed. 309, 26 Sup. Ct. Rep. 144, both citing the foregoing case. See also 5 L.R.A.(N.S.) 727.

The expression used by Judge Birdzell, "*expressio unius est exclusio alterius*," has been given a strained construction, and a strained construction that, in my judgment, is not warranted either in this case or in its application to any other case. In connection with the construction given to it the case of State ex rel. O'Bannon v. Cole, 220 Mo. at page 697, 119 S. W. 424, should be read and applied. See same case in 22 L.R.A.(N.S.) 986.

A number of other authorities might be multiplied, and the mere fact that the greater number are on statutory provisions does not justify, in my opinion, the opinion of Judge Birdzell in his construction of the statute, nor does it do away with the right of the board of health as a preventive act to deny the right of attendance in public schools to pupils who cannot present a vaccination certificate.

There were other questions discussed and considered by the court, and a few references to them and to a general discussion of the matters involved, as they appear to me in this case, are herewith submitted.

It may be properly said that smallpox, against which and to prevent which vaccination is ordered, is a disease that when it attacks a person does in most cases permanent and irreparable injury. A large number of the patients attacked by smallpox have their faces permanently disfigured, and this fact, on account of the weakness of human nature, subjects each individual having had an attack of smallpox to more or less social ostracism and likewise to more or less business ostracism throughout his or her entire life. This is a fact that may be said to have become patent, and therefore the state in its sovereignty may use all legitimate power to protect the individual as well as to protect the community. The purpose of vaccination is to establish im-

munity, not simply to erect a bar when an epidemic is threatening or likely. When this fact is kept in view, the vaccination laws will be better understood and more fully appreciated.

The state has a right through its police power to provide for the future as well as the present welfare of not only communities, but of the individuals making up the several communities, and this being so it has the right to provide immunity against possible permanent disfigurement of any individual and the several individuals in the communities by precautionary measures. The schools of the country are the groundwork of our present and future democracy. Public schools are the public levers that lift the burden and carry the burden of statehood and also carry the burden of social and religious progress and perpetuity. For these reasons every reasonable protection should be thrown about them and about the individual pupil members. This would seem to be legitimate and wise reasoning, and therefore should be considered in considering the question of the constitutionality of the legislative act and the order of the board put in question in this appeal.

If the order is not broad enough to take in all that it should, that is to say, if it would have been proper and wise to compel the vaccination of teachers, or rather to compel teachers to prove that they had been vaccinated before they would be permitted to teach, and if it would have been wise to provide for the revaccination of pupils after seven years lapsed, these matters cannot and should not of themselves defeat the present law or the order appealed from if it of itself is proper and reasonable legislation. This would seem to be a rightful interpretation of statutes, and more especially as upon every statute book in every state in the Union can be found a multitude of laws incomplete in themselves as to the full purpose which the people may have in mind and yet they are constitutional and enforced.

There was another matter urged against the order appealed from and urged as a reason why it should not be enforced, and that was that the appellant has conscientious scruples against vaccination. This was not urged as strenuously as some of the other contentions, yet it was dwelt upon to some extent by the counsel for the appellant. It may be said in this connection that, if alleged conscientious scruples were a factor in this case, they could also be a factor in practically everything that comes up that refers to the enforcement and execution of the police

power that does not directly pertain to the commission of a criminal offense, either felonious or misdemeanor.

The whole people must be served, and the best interests of society, the state, and the individual are common, and no conscientious scruples of individuals can be permitted to outweigh and defeat necessary public legislation or necessary public administrative acts. To make conscientious scruples a basis for negating a law or an administrative order would be to bring in disorder, and if carried far enough, bring in a condition of affairs that would at least border very near to a state of anarchy.

The following cases are in point and illustrative of the law and its constitutionality, which also involves the legality of the order appealed from, and a careful reading of them will more fully sustain the proposition hereinbefore noted.

Re Viemeister, 179 N. Y. 240, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334, in which appears the following language as used by that court, together with citations: "A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. While the power to take judicial notice is to be exercised with caution, and due care taken to see that the subject comes within the limits of common knowledge, still, when according to the memory and conscience of the judge, instructed by recourse to such sources of information as he deems trustworthy, the matter is clearly within those limits, the power may be exercised by treating the fact as proved without allegation of proof."

Also the following: "The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which according to the common belief of the people are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of

the Constitution, and would sanction measures opposed to a republican form of government."

State ex rel. Milhoof v. Board of Education, 76 Ohio St. 306, 81 N. E. 568, 10 Ann. Cas. 879. In this case the following language is used: "Such claim necessarily assumes that the power conferred upon boards of education by § 3986, Revised Statutes, cannot rightfully be exercised by them, unless at the time of its exercise smallpox actually exists in the community, or an epidemic of the disease is then reasonably to be apprehended. But the statute conferring the power has imposed no such condition or limitation upon its exercise, and we know of no reason or authority from which such condition may be implied. It is matter of universal knowledge that, with our present rapid means of intercommunication, smallpox is liable to make its appearance at any moment in any community. If then, as is the common belief, vaccination is a preventive, or a protection against this dread disease, which Macauley denominated 'the most terrible of all ministers of death,' certainly it may not be said that for a board of education to adopt, as a protective and precautionary measure, a rule or regulation requiring vaccination as a prerequisite to the right to attend public schools, is an unwarranted or unreasonable exercise of the power expressly conferred upon it by statute, even though smallpox does not at the time actually exist in the district or community, for it may truly be said that 'an ounce of prevention is worth a pound of cure.'"

In Auten v. School Bd. 83 Ark. 435, 104 S. W. 130, the following is a part of the language used: "It is a matter of common knowledge of which the court can take judicial notice that the great majority of medical writers and practitioners advocate vaccination as a safe and efficient means of protecting cities and thickly settled communities against the scourge of smallpox."

In the case of Stull v. Reber, 215 Pa. 163, 64 Atl. 419, 7 Ann. Cas. 415, the following language is used: "One expression in the opinion of the court below, and in some of the cases cited in the argument, requires a passing note. The act is not a penal statute. It is a broad, general act relating to the health of the whole population of the commonwealth. It is not, therefore, to be construed or administered by the rigid technical rules applicable to penal laws, but fairly accordingly to its intent, neither narrowing it to the letter, to the exclusion of cases

clearly within such intent, nor stretching it beyond its legitimate scope to cover matters not clearly meant to be included. It is an act touching very closely common rights and privileges, and therefore specially requiring a common-sense administration."

See also *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873.

In *Bissell v. Davison*, 65 Conn. 189, 29 L.R.A. 251, 32 Atl. 348, the following language is used: "But the plaintiff urges that the vote was not warranted by law because, at the time it was passed, 'it does not appear that there was a single case of smallpox in the town of New Britain, nor any indication that an epidemic of that disease was likely to present itself.' This claim assumes that the power in question cannot be exercised by the school committee unless at the time of its exercise one or more cases of smallpox exist in town, or an epidemic of the disease is reasonably to be apprehended. But the statute conferring the power has imposed no such conditions upon its exercise, and we see no good reasons why any such conditions should be implied."

A careful reading and consideration of these cases will more fully illustrate what I have stated herein, and will give greater light on the matter here in controversy. The police power of the state is a comprehensive power and one which becomes broader both by legislation and construction as our common country gets a greater and more congested population. What may have been sufficient laws ten or twenty years ago are not sufficient for all matters at the present time. Any law or laws that are now sufficient in a great many respects in reference to police power may not be sufficient laws ten or twenty years hence for the welfare and health of the people. It may be said in this connection that the word "needful" or "needed" must be liberally construed and must admit of a liberal interpretation when applied to administrative and executive powers. If this be not so, controversies may arise and processes be brought into court which would stay the hand of the administrative bodies, to whom falls the duty of the protection of the public health and morals, as well as the private health and private protection of the separate individuals. A strict construction of language in the statutes in question in this case would defeat its purpose. It is not necessary for the boards of health to wait for an actual epidemic nor a threatened epidemic before making an order prohibiting the attendance at school by any pupil who cannot and does



not present a certificate of vaccination from a reputable physician. Because the law does not provide for revaccination or the vaccination of adults does not defeat the purpose and intent of the law, nor in this case negative the power of the board in question to make the order made by it and enforce it.

It is alleged that the law discriminates in favor of class or rather it is class legislation. This contention is without merit. There are municipal ordinances against permitting minors in pool rooms no matter how well the pool rooms are conducted. There are curfew ordinances compelling all children under a certain age to be at home before a certain fixed hour at night. There are a multitude of similar laws, either enacted by the state or municipalities,—all held valid because they serve a useful and necessary purpose. Jurists sometimes get confused in the matter in attempting to define class discrimination. There is no class discrimination when rules and regulations are based upon the matter of age for the protection of persons and property, nor is there class discrimination when police regulations are enacted to cover specific occupations when such regulations are seemingly and wisely necessary. There is class discrimination when any law, order, or regulation undertakes to say that one individual may do and another individual may not do a thing when such individuals are similarly situated, engaged in like occupations, are of mature age, and otherwise alike.

This, however, is not the kind of distinction made in the law governing vaccination. It may be said, further, that the provision for having a parent or guardian see to it that a minor shall be vaccinated gives full authority for boards of education to deny admission to the public schools unless the minor or child of school age is or has been vaccinated. This does not necessarily mean compulsory vaccination except for school privileges. This fact might be further illustrated, but it is not deemed necessary at this time.

The order of the District Court of Ramsey County should be in all things affirmed.

W. L. MACKEY, Trustee, Respondent, v. JAMESTOWN GAS COMPANY, a Corporation, and A. D. Grant, Appellants.

(171 N. W. 92.)

**Negotiable instruments—corporations—authority of agent—ostensible authority.**

This is an action on a promissory note of the Jamestown Gas Company. The note was given for the balance of an account due from the gas company to the plaintiff. It was made in the name of the company by one A. D. Grant, who was the general agent, general manager, secretary and treasurer of the company. It is *held* that Grant had ostensible authority to execute the note on behalf of the gas company.

Opinion filed January 31, 1919.

An appeal from the District Court of Barnes County, Honorable J. A. Coffey, Judge.

Affirmed.

C. S. Buck, for appellants.

The burden was on the plaintiff to show that Grant, as secretary and treasurer, was authorized by the corporation's by-laws, or some resolution of the corporation, to execute the note. *Jacobus v. Jamestown Mantel Co.* (N. Y.) 105 N. E. 210; *Mather v. Union L. & T. Co.* 7 N. Y. S. 213; *Olcott v. Tioga R. Co.* 27 N. Y. 546.

Winterer, Combs, & Ritchie, for respondent.

Where the agent of a corporation is clothed with ostensible authority to execute notes, the plaintiff was not charged with knowledge of the contents of the corporation's by-laws, or with negligence in failing to acquaint himself with their contents. *Merritt v. Adams Co. Land & Invest. Co.* (N. D.) 151 N. W. 11; *Grant County State Bank v. Northwestern Land Co.* 28 N. D. 479, 150 N. W. 736; 10 Cyc. 930; *Stubbs v. Bank*, 12 Ga. App. 539, 77 S. E. 893.

ROBINSON, J. This is an appeal from a judgment against each defendant on a promissory note, dated January 28, 1914, due August 1, 1914, for \$1,115.26, with interest at 7 per cent. Pending the action several payments were made on the note, and on January 16, 1917,

judgment was entered for \$931.49. The note was made by A. D. Grant for the company and himself, and at the time of making it he was acting as the general agent, manager, secretary, and treasurer of the company. He signed the note thus: "The Jamestown Gas Company, by A. D. Grant, Secretary and Treasurer." Before delivery he signed his own name on the back of the note and thereby became liable as a principal the same as if his name had been signed on the face of the note. The consideration for his signature was an extension of time to pay the debt. Before making the note Grant looked over the books of the company, in his possession as secretary and treasurer, and computed the amount due. After suit was brought a written stipulation was made that the note was given for the correct amount due, and the suit was continued over several terms to give defendants a chance to make monthly payments. The stipulation was dated January 4, 1915, and approved by the court. Afterwards, on September 26, 1916, the stipulation was set aside on affidavits challenging its correctness. Then, on January 14, 1917, the case was brought on for trial, and at the close of the testimony each party moved for a directed verdict, and by such motion the case was taken from the jury and submitted to the court.

The main defense was that Grant did not have authority to make the note for the gas company, and that his signature was without consideration. But the evidence clearly shows that at and prior to the time of the making of the note Grant was acting as the general agent, manager, secretary, and treasurer of the company, and hence he had ostensible authority to make the note; and the extension of time for payment of the debt from the date of the note until its maturity was ample consideration for the signature of Grant, and as he signed the note before its delivery and acceptance he became a joint maker, and not merely an indorser. Of course the defendant had ample opportunity to answer and to offer evidence to reduce the amount of the note by showing any mistake or error in the account for which it was given, but the answers do not aver any mistake in the note or in the account for which it was given, and the evidence does not show any error or mistake. The showing is that the note was given for the precise amount due and owing by the gas company to the plaintiff.

On the pleadings and the evidence and the whole record, it does not

appear that the defense was made in good faith. It does appear that the note was justly due and owing on August 1, 1914, which is four and one-half years ago.

Judgment affirmed and case remanded forthwith.

CHRISTIANSON, Ch. J., and BRONSON and BIRDZELL, JJ., concur in the result.

CHRISTIANSON, Ch. J. (concurring specially). The plaintiff recovered judgment in this case against both A. D. Grant and the Jamestown Gas Company. The liability of Grant is conceded. He has not appealed. And the only question presented to this court is whether Grant had authority to execute the note in behalf of the gas company. I fully concur in the conclusion reached by Mr. Justice Robinson that Grant had ostensible authority to execute such note. I do not, however, concur in his *obiter dicta* regarding the character of liability assumed by a person who places his signature on the back of a negotiable instrument. The character of the liability so assumed is declared by §§ 6948 and 6949, Comp. Laws 1913, to be that of an indorser. All the members of the court, with the exception of Judge Robinson, concur in the views expressed above.

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RENA DRUEY, Appellant, v. S. W. BALDWIN, Administrator of the Estate of Margaret Druey, Deceased, with the Will Annexed, Defendant and Respondent, and ELLA BALDWIN, Lillie Smith, et al., Interveners and Respondents.

(172 N. W. 663.)

**Evidence—transactions with deceased persons—admissibility.**

1. In an action against an executor and the heirs at law of the estate of a deceased, to secure the delivery of a deed and to quiet title to realty claimed by the estate, the testimony of the executor, the husband of the plaintiff, concerning a transaction had with the deceased, is not made admissible under the provisions of § 7871, Compiled Laws 1913, subd. 2, by calling such witness as an adverse party, where it appears that such evidence and such witness are antagonistic to the interests of the estate.

**Evidence — competency of witnesses.**

2. A witness who is incompetent to testify under the provisions of § 7871, subd. 2, Compiled Laws 1913, directly to the delivery of a deed by the deceased, is likewise incompetent to testify as to the possession of the same, where the purpose thereof is to establish that a delivery or nondelivery thereof must be inferred.

**Trial under Newman Act — record — encumbrance of record.**

3. In trials under the Newman Act it is the duty of attorneys to carefully refrain from encumbering the record with incompetent, immaterial, or irrelevant testimony, and the trial court may properly indicate during the course of the trial its views when the attorneys are so doing.

**Quieting title — determination of adverse claims — judgment.**

4. In an action to determine adverse claims, where the executor and the heirs at law of the estate of the deceased are parties thereto, and the findings of the trial court are in favor of the estate, the judgment thereupon should quiet title in the heirs at law, and in the executor for purposes of administration.

Opinion filed January 31, 1919.

Appeal from a judgment of the District Court of Ward County, Leighton, J., quieting title in the interveners.

Modified and affirmed.

*E. R. Sinkler* and *M. O. Eide*, for plaintiff and appellant.

"Neither party shall be allowed to testify against the other as to any transactions whatever with or statements by the testator or intestate, unless called to testify thereto by the opposite party." Comp. Laws 1913, § 7871, subd. 2; *Wall v. Wall*, 45 L.R.A.(N.S.) 583, note.

"The admissions of a person in disparagement of his title, but not in contradiction of a record title, are competent against those claiming under or through him, so far as there is identity of interest." *Stewart v. Stewart*, 41 Wis. 624; *Pritchard v. Pritchard* (Wis.) 34 N. W. 506.

"A grant is presumed to have been delivered at its date." Comp. Laws 1913, § 5496; *Leonard v. Flemming*, 13 N. D. 629; Comp. Laws, § 5500; 13 Cyc. 561.

"What constitutes a sufficient delivery is largely a matter of intention, and the usual test is, Did the grantor, by his acts or words or both, manifest an intention to make the instrument his deed, and thereby divest himself of title?" *Kelsa v. Graves*, 68 Pac. 608; *Wooster v.*

Folin, 56 Pac. 490; Tucker v. Allen, 16 Kan. 319; Farrar v. Bridges, 42 App. Div. 439; 13 Cyc. 562; Hatch v. Stevens, 6 Minn. 24.

"Redelivering a grant of real property to the grantor or canceling it does not operate to retransfer title." Comp. Laws 1913, § 5499.

A return of a deed to the grantor does not negative the previous delivery, or operate as a surrender of the title thereby acquired. 13 Cyc. 563, and cases cited.

"Husband and wife must both sign to encumber or convey homestead." Comp. Laws 1913, § 5608.

"Only by law or writing. Any estate in real property other than an estate at will or for a term not exceeding one year can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same or by his agent, thereunto authorized in writing." Comp. Laws 1913, § 5511.

"Delivery is absolute. A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent as such is necessarily absolute, and the instrument takes effect thereupon discharged of any condition on which the delivery was made." Comp. Laws 1913, § 5497.

"A deed becomes operative from the time of delivery to the grantee and its operation cannot be affected by proof of any agreement in conflict with the plain terms of the instrument."

"A grantor cannot by any act subsequent to the delivery of his deed invalidate, alter, or affect the instrument." 13 Cyc. 572, and cases cited.

"The husband has no original or inherent power to act as his wife's agent, and his authority arises only from her appointment. It cannot be implied from the marital relation or from circumstances which ordinarily owe their existence solely to the marriage relation." 21 Cyc. 1238, and cases cited.

"One who, with knowledge of the facts and without objection, suffers another to make improvements or expenditures on or in connection with his property or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on and been misled by his conduct." 16 Cyc. 766, and cases cited.

*Hall, Alexander, & Purdy and Bagley & Thorpe*, for interveners and respondents.

Where a deed is found in the possession of the grantor unexplained, the presumption in relation to the delivery thereof is exactly opposite to those where the deed comes from the possession of the grantee. *Cassiday v. Holland* (S. D.) 130 N. W. 771.

While the redelivery or destruction of the deed can have no effect as to the transfer of the legal title, it may under certain circumstances vest an equitable title, or at least preclude the grantee from asserting the same. 1 *Warvelle, Vendors*, § 505; *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; *Barnhart v. Anderson* (S. D.) 118 N. W. 31; *Linker v. Long*, 64 N. C. 296; 13 Cyc. 724-729; *Warvelle, Vendors*, § 505; 1 *Pom. Eq. Jur.* § 147.

Where the cancelation or surrender of a deed was made under such circumstances as would render it a fraud upon the part of the grantee to retain the title, a constructive trust in favor of the original grantor, or those claiming under him, will be adopted as a convenient machinery for the fulfilment of justice. *Willeys v. Christ*, 4 Watts, 196; *Neill v. Spigle*, 33 Ark. 63; *Tallifero v. Rolton*, 34 Ark. 503; *Crossman v. Keister* (Ill.) 8 L.R.A.(N.S.) 698; 18 L.R.A.(N.S.) 1170 et seq.

The words "adverse party" are not limited to the adverse position of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, where the latter has acquired title to the cause of action immediately from a deceased person. *Jones, Ev.* § 773; *Wells v. Chase* (Wis.) 105 N. W. 303; *McCormick v. Herndon* (Wis.) 31 N. W. 303; *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

BRONSON, J. This is an action to secure the delivery of a deed and to determine adverse claims to certain real estate situated in the city of Minot. From the findings made and the judgment rendered by the trial court quieting title in such realty in the interveners and respondents herein, the plaintiff appeals, and demands a trial *de novo*.

The substantial undisputed facts are as follows: Margaret Druey died during the month of December, 1916. She was the mother of the interveners and John Druey, the original defendant herein. The plaintiff is the wife of John Druey. By the last will and testament

of the deceased, it is provided that the property involved shall be divided equally among her children herein named. In the month of November, 1908, the deceased executed a warranty deed of this property involved to the plaintiff, as grantee. At this time and until the month of October, 1909, when they removed to Canada, the plaintiff and her husband resided upon these premises. After the death of the deceased, this deed was found in a little tin box belonging to the deceased and in which she kept other papers. John Druey, named as executor in the will, qualified as such, and in the month of March, 1916, listed, in the inventory of the property of the estate, this realty as assets of the estate. In the month of September, 1916, the plaintiff made a written claim of ownership concerning this property, upon her husband, then the executor, and thereafter commenced this action. Thereupon the interveners herein, the daughters of the deceased, were permitted to intervene.

The principal and controlling point in this case is the question whether the deed was delivered. The appellant contends that a delivery has been established in the record, relying largely upon the testimony of the appellant and her husband that the deed in question was delivered by the deceased to the appellant at the home situated on the property involved on the day the same was executed, and also in part upon the testimony of a third witness, one Mrs. Jack, that the deceased had told her in a conversation that she had sold the property to John Druey and had given him a deed for it. The respondents, on the contrary, maintain that the evidence shows in fact no delivery of the deed, not only by the surrounding circumstances showing continued acts of dominion over the premises by the deceased through improvements made, taxes paid, insurance maintained, and contracts of sale had concerning the property, but also by evidence in the record that the deed was retained by the deceased continuously because no full settlement ever had been made for the purchase price to be paid by the appellant.

The appellant testified that the deed in question was delivered to her by the deceased on the property in question at their home the day the same was made, and that she retained the same in her possession until the following fall, when she returned the same to the deceased



to keep for her. The defendant, her husband, was called for cross-examination under the statute as an adverse party by the appellant and thereafter by the respondents, and likewise testified that the deceased so delivered such deed to the appellant, his wife, and that he made the arrangements and paid the consideration, namely, \$600, and the return of a lot which his mother theretofore had given to him.

Objection was made by the respondents to the competency of these witnesses to so testify concerning a transaction had with the deceased under the provisions of § 7871, subd. 2, Comp. Laws 1913. Objection was likewise made by the appellant to the testimony of the husband when called for cross-examination by the respondents.

Laura Anderson, one of the interveners, and a witness for the respondents, testified that when the deed was executed, her mother, the deceased, took the same home with her and put it in the little tin box mentioned, and that there, from time to time afterwards, she saw it when she had occasion to open it with and for her mother. Ella Baldwin, another of the interveners, and a witness for the respondents, testified that she saw this deed several times, commencing in the fall of 1909, in this tin box when she would help her mother open this box.

Objection was likewise made by the appellant to the competency of these witnesses to so testify under the provisions of the section quoted. This testimony substantially covers the direct testimony in the record of delivery or nondelivery of the deed in question by the deceased to the appellant.

We are clearly of the opinion that the objections so made to the competency of these witnesses to so testify was good, and that the testimony in question was inadmissible. *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; *McDonald v. Harris*, 131 Ala. 359, 31 So. 548.

All of this testimony related to a transaction with the deceased: a transaction in which necessarily she took part, was a party thereto, and participated therein.

The very essence of the whole matter, of the title involved, was the fact of the delivery or nondelivery of the deed; or of the possession or nonpossession thereof, of which peculiarly and necessarily the deceased was not only a participant, but had direct knowledge.

In this state, the purposes of the statute involved to prevent any party from securing an undue advantage in establishing, by his testimony, what transaction or conversation took place, when the lips of the other party are sealed by death, have been clearly expressed and continuously followed by this court. *Braithwaite v. Aiken*, 2 N. D. 61, 49 N. W. 419; *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613; *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; *Cardiff v. Marquis*, 17 N. D. 116, 114 N. W. 1088; *Larson v. Newman*, 19 N. D. 160, 23 L.R.A.(N.S.) 849, 121 N. W. 202; *Truman v. Dakota Trust Co.* 29 N. D. 456, 151 N. W. 219; *Lake Grocery Co. v. Chiostrri*, 34 N. D. 386, 158 N. W. 998.

Likewise, the testimony offered concerning the possession of the deed by these witnesses, who were incompetent to testify directly concerning the delivery of the deed, was inadmissible for the reason that it could be so introduced only for the purpose of establishing a state of facts from which a delivery or a nondelivery of the deed might be inferred. *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613; *Wall v. Wall*, 139 Ga. 270, 77 S. E. 19. See note in 45 L.R.A.(N.S.) 583.

The fact that the husband, the defendant, was called so to testify by the wife, the plaintiff, as an adverse party for cross-examination under the statute, did not bring such witness without the statute, for it is plain to see from his testimony and his attitude in this whole record that his testimony and his interest were antagonistic to the interest of the estate. *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213.

The further fact that this defendant, the husband, was later called as an adverse party for cross-examination under the statute, by respondents, and further testimony elicited from him concerning this transaction with the deceased, did not render the witness or his testimony in this regard competent under the circumstances disclosed by the record; for this witness was first called by the plaintiff and this incompetent testimony elicited. Apparently the respondent did not consider him their witness so that they should take him or ask the court for permission to question him, as if upon redirect examination; following the rule laid down in *Fawcett v. Ryder*, 23 N. D. 20, 135

N. W. 800, 3 N. C. C. A. 153, and in *Luick v. Arends*, 21 N. D. 614, 132 N. W. 353.

They sought, therefore, to examine him upon these matters by calling him as an adverse party for cross-examination under the statute, and to his testimony given concerning this transaction with the deceased, the appellant seasonably objected. We are of the opinion that the witness still remained incompetent for the purposes of the testimony so adduced.

It is therefore clear that, with this incompetent testimony eliminated, there is no such clear and satisfactory evidence shown which is requisite to establish the delivery of the deed. *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8.

In any event we are further satisfied from the entire record as it is that the proof is not sufficiently clear and convincing to warrant this court in finding that there was a delivery of the deed or in disturbing the finding of the trial court in that regard.

In this respect, it is deemed proper to suggest to the trial courts and to the bar of this state that in the trial of cases under the so-termed Newman Act, it is the duty of the bar to carefully refrain from introducing into the record evidence which clearly is incompetent, immaterial, or irrelevant, or otherwise inadmissible, and the trial court may properly indicate during the course of the trial in the record the admissibility of such testimony, but not by ruling thereupon, so that the counsel in the case may then be advised of the trial court's view on the matter, and that their attention may be called thereto, in order that this court upon review may exercise its authority for the imposition of a penalty whenever from the record it may appear proper so to do.

However, we do find error in the findings of fact and conclusions of law of the trial court which require a modification of the judgment there rendered.

On May 14, 1918, the trial court made an order substituting S. W. Baldwin, administrator of the estate of the deceased with the will annexed in place of the defendant John Druey, as executor.

In the findings, conclusions, and judgment, the trial court quieted title in premises involved in the interveners, the heirs at law, without

any reference to the right or interest of the executor therein as a representative of the estate and of its administration.

In this regard the trial court erred. The judgment herein should provide for the quieting of title in such heirs at law and in the executor or administrator thereof, for purposes of administration.

The executor was, and the administrator is, a party to this action. By the statute and by the law of this state, an executor or an administrator has the right to the possession of the realty of estate pending administration. The heirs cannot disturb him in this possession; he may maintain an action to quiet title or to determine adverse claims. The judgment where he is a party should not ignore this right. *Comp. Laws 1913, § 8797; Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029; Berry v. Howard, 26 S. D. 29, 127 N. W. 526, Ann. Cas. 1913A, 994.*

Accordingly, this cause is remanded to the trial court with instruction to modify the judgment pursuant to this opinion; neither party shall recover any costs on this appeal.

GRACE, J. I concur in the result.

ROBINSON, J. John Druey is a son of the deceased, and the plaintiff is his wife. The plaintiff brings this action to quiet her title to a lot in Minot, and she appeals from a judgment against her. She claims title under a deed made by her deceased mother-in-law, which deed was not recorded, and was found among the papers of the deceased. The express consideration of the deed is \$1,650. It is dated and acknowledged November 9, 1908, and signed by Margaret Druey (by her mark). As John Druey testifies, the plaintiff was not present when the deed was made, but it was subsequently delivered to his wife in her home, when no one was present only John, the mother, and his wife. He paid for the deed, by check, \$400, and cash, \$200, and by a release of a claim to a lot given him or his wife by the deceased. He and his wife lived on the lot in question several months, when they left it and went to live on a homestead in Canada. On their leaving for Canada the deceased gave to John \$600, which he claims to have received as a loan, and it is claimed that the plaintiff gave back the deed to her mother-in-law for safe-keeping. However, the mother took posses-

sion of the lot as her own, contracted to sell it to one party, who put on it a house worth \$3,600. She paid him \$3,600 and rescinded the contract; and in the same way she contracted to sell it to another, and by agreement that contract was rescinded. She paid on the property all the taxes, and insured it in her own name, and treated it as her own, and plaintiff never asserted any title to it. In 1916 she died and John was appointed administrator of the estate. He made and swore to an inventory of the estate in which the lot was listed as part of the estate of the deceased, and the \$600, which he claims to have received as a loan, was not listed as an asset of the estate. Afterwards, some six months after the appointment of the administrator, the plaintiff brought this action against her husband, and him alone, to quiet title to the lot and to compel him to deliver the deed to her. He served an answer admitting her claim. Then the other heirs of the deceased intervened. Doubtless the deed was made with the intention of delivering it to the plaintiff and selling the lot to her. There is no convincing proof of a delivery of the deed, while the proof is entirely convincing that if there was a delivery or a contract to deliver the deed to the plaintiff, the transaction was rescinded. The consideration was restored, the deed was delivered back to the deceased, and she entered into possession of the premises as owner; and it is fair to presume that if the deed had been delivered John or his wife would have put it on record, and that the property would not have been listed as a part of the estate. The facts in the case speak louder than words, and show conclusively that the lot in question was properly listed as a part of the estate.

The findings of fact, as made by the trial court, are in accordance with the evidence, and the conclusions of law are correct.

Judgment affirmed.

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H. P. HANSON, Respondent, v. L. M. SUMMERVILLE,  
Appellant.

(171 N. W. 608.)

**Contracts, sale of land — services of agent — reasonable value.**

In an action brought for the recovery of the reasonable value of services

rendered in securing renters for lands owned by the defendant, the evidence is examined and *held* to be sufficient to establish such reasonable value.

Opinion filed January 31, 1919.

Appeal from judgment and order of the District Court of Ward County, *Leighton, J.*

Affirmed.

*Greenleaf, Woledge, & Lesk*, for appellant.

The purchasers furnished must be ready, willing and able to buy at the price specified. *Ball v. Dolan*, 101 N. W. 722; *Anderson & Jorgenson v. Johnson*, 16 N. D. 176; *Zeimer v. Antisell* (Cal.) 17 Pac. 642.

The purchaser must be produced within the time limited in his contract. *Zeimer v. Antisell* (Cal.) 17 Pac. 642; *Anderson & Jorgenson v. Johnson*, 16 N. D. 176.

The broker cannot recover unless he performs his agreement, regardless of how much work and labor he may have performed. *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 38 Am. Rep. 445; *Trickey v. Crowe* (Ariz.) 71 Pac. 967; *Garcelon v. Tibbetts*, 84 Me. 148; *Viaux v. Old South Soc.* 133 Mass. 110; *Loud v. Hall*, 106 Mass. 404, 407; *Kurtz v. Payne Inv. Co.* 135 N. W. 1075.

*Palda & Aker*, for respondent.

The appellate court will not overrule the verdict of a jury on a question of fact supported by proper evidence. *Ward & Murray v. McFuller*, 13 N. D. 153; 19 Cyc. 246, 265.

Refusal of the owner to finish the sale upon the terms agreed will not defeat the agent's right to commissions. *Ibid.*

BIRDZELL, J. This is an appeal from an order entered in the district court of Ward county, denying the defendant's motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial; and from a judgment in favor of the plaintiff which was rendered upon a verdict of the jury in the sum of \$640 and costs.

The action is one for the recovery of the reasonable value of services rendered by the plaintiff to defendant in securing renters for certain lands owned by the defendant. The complaint alleges an ar-

rangement whereby the defendant had employed the plaintiff to procure buyers for his lands at an agreed commission of \$4 per acre, if the plaintiff paid his own expenses, or \$2 per acre if the plaintiff's expenses were paid by the defendant. It is further alleged that, pursuant to this agreement, the plaintiff procured certain prospective buyers and brought them to the vicinity of Kenmare, where the lands were situated, and that the defendant, instead of completing negotiations for the sale of the lands to the buyers so procured, induced them to rent the lands from him for a period of three years, and that at the time the rental negotiations were pending the defendant assured the plaintiff that he would lose nothing by the change. The defendant alleges that the reasonable value of the services rendered by the plaintiff in obtaining the renters for the defendant was \$50, and that this sum had already been paid.

The appellant advances six propositions in support of his contention that the judgment is erroneous. They are: (1) That the only agreement between plaintiff and defendant was that the plaintiff was to procure buyers for defendant's lands. (2) That the testimony of the prospective purchasers shows that they were not ready, willing, and able to buy, and that no sales were consummated. (3) That plaintiff's testimony establishes a failure to procure purchasers. (4) That there is a failure of proof of the allegation that the purchasers furnished were ready, willing, and able to buy according to the list price. (5) That there is no evidence of an agreement between plaintiff and defendant for the payment of compensation in case of failure to procure purchasers. (6) That there is no evidence upon which the jury could find the reasonable value of the plaintiff's services. The first five of these propositions are entirely out of the case, as we view it, for the reason that the action is not predicated upon the performance by the plaintiff of the listing agreement. The listing agreement is only referred to in the complaint by way of inducement to the allegations covering the obligation to pay to the plaintiff the reasonable value of his services in procuring renters. The gravamen of the complaint is for *quantum meruit*, and not for an agreed compensation. The allegations preceding the alleged breach of the agreement to pay a reasonable compensation also bear a direct relation to the reasonable value, in that it is alleged that the defendant agreed that the

plaintiff would lose nothing by the change in the negotiations from a sale to a rental proposition.

This brings us to the sixth contention, which is that there is no evidence to prove the reasonable value of the services. There is evidence that the defendant told the plaintiff to keep his hands off, and that the defendant would make his own deal with the prospective purchasers. There is also testimony by one of the prospective purchasers to the effect that when the rental proposition was under consideration he asked the defendant, "What will Hanson [the plaintiff] get out of this deal?" and the defendant replied, "I will see that Hanson does not lose anything." This testimony is corroborated by the plaintiff. In our opinion, this evidence, when considered in the light of the express contract, governing the amount of commissions in case of sale, affords sufficient basis for the verdict. Evidence going to show the value which the defendant himself placed upon the services rendered at his request constitutes an admission by him and is of an unusually satisfactory character in an action based upon *quantum meruit*.

For the foregoing reasons, the order and judgment appealed from are affirmed.

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M. A. HILDRETH, Respondent, v. WILLIAM O. HONSINGER,  
Appellant.

(171 N. W. 332.)

**Attorney and client—attorney's fees—when client obstructs sale of land from which fees are to be paid, attorney is entitled to reasonable compensation.**

1. In an action brought for the recovery of reasonable attorneys' fees earned in conducting litigation for the defendant, and for necessary expenses incurred therein, the evidence is examined and *held* to support the verdict.

**Attorney and client—where attorney is to be paid from proceeds of sale of land, relationship is one of mutual confidence.**

2. Where an attorney is employed to institute partition proceedings for a client, and it is agreed that he is to be compensated and reimbursed out of the proceeds of a sale of the real property to be partitioned, the relationship established between the attorney and client is one of mutual confidence; and where the client, without communicating with his attorney, obstructs the



progress of the proceedings, the attorney is entitled to reasonable compensation for his services rendered and to reimbursement of his expenses.

Opinion filed January 31, 1919.

Appeal from order of District Court of Cass County, *Cole, J.*, denying a motion for judgment *non obstante veredicto* or for a new trial.

Affirmed.

*Fowler & Green*, for appellant.

Where there is an agreement for a contingent fee, the happening of the contingency is a condition precedent to the right of the attorney to recover for his services, and the precise event which was contemplated must happen. 4 Cyc. 991; *Freerks v. Nurnberg*, 33 N. D. 587; *Cotzhausen v. Central Trust Co. (Wis.)* 49 N. W. 158.

*M. A. Hildreth in propria persona* and *M. D. Hildreth (Carmody, Loudon, & Mulready*, of counsel) for respondent.

Appellant having violated such alleged contract, and prevented the respondent from collecting his compensations and disbursements out of the proceeds of sale of the real estate hereinbefore mentioned, appellant was personally liable to respondent for such fees and disbursements. *Snyder v. Snyder*, 14 L.R.A.(N.S.) 1101; *Winslow v. Murphy*, 45 L.R.A.(N.S.) 750; *Hazeltine v. Brockway*, 57 Pac. 1077; 6 C. J. 740.

**BIRDZELL, J.** This is an appeal from an order of the district court of Cass county denying appellant's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, and also from a judgment in favor of the plaintiff for \$541.16.

The action is one for the recovery of reasonable attorney's fees and for expenditures in connection with partition suits instituted by the plaintiff for the defendant; also for services rendered in certain proceedings in the county court of Cass county looking toward the sale of the same real estate in probate court.

The only question involved upon this appeal is the sufficiency of the evidence to support the verdict and judgment. The evidence of the arrangement between the plaintiff and the defendant is contained

in correspondence passing between the plaintiff and the defendant's attorneys, Agnew & Agnew, of Plattsburg, New York. As this correspondence is interpreted by the appellant, there was an express contract between the plaintiff and the defendant whereby the former was to depend for his disbursements and fees wholly upon the success of the litigation; that is, such expenses and fees were, it is contended, to be only such as would be allowed by the court in the partition proceedings.

The respondent, on the other hand, contends that the arrangement did not contemplate that he should not be compensated if a partition was not had; and that, in any event, the defendant is liable by reason of having voluntarily thwarted the efforts of the plaintiff in conducting the litigation on his behalf.

It appears from the correspondence introduced in evidence that on November 17th, Agnew & Agnew introduced the negotiations with the plaintiff by inquiring as to the interest a widow takes in her deceased husband's real estate under the laws of this state, where the deceased is survived by a widow and adult children. After receiving correct advice on this subject from the plaintiff, Agnew & Agnew wrote the plaintiff to the effect that they represented one of the heirs (the defendant) of Willis T. Honsinger, who desired to commence an action in partition, and who also desired to know whether or not the costs of the partition would be paid out of the proceeds of the sale, and what it would cost him in any event, if the plaintiff were requested to commence such action. It was also stated that the heirs were not in harmony, and that one, W. B. Stewart, a brother-in-law of the plaintiff, had left New York for North Dakota a few days previous to the letter. To this letter the plaintiff replied fully, calling attention to the sections of the statute in which provision is made for paying the general costs of the action, including counsel fees, out of the proceeds of the sale. Immediately following this letter, and on December 1, 1915, plaintiff again wrote Agnew & Agnew, advising them of the publication of a citation in probate proceedings which were apparently being instituted by the other heirs, and further advising with reference to the rights of the survivors in the appointment of an administrator. Upon receipt of this adequate advice, defendant's attorneys again wrote the plaintiff (December 6th), stating that they had taken

up the matter with their client, and that he wished the partition proceedings instituted and closed as soon as they could be; also that he did not care to bother with the administrator appointment "for certain reasons." They also indicated that the client declined to forward a retainer fee which had been requested, owing to the fact that fees in such matters are secured out of the proceeds of the sale. Still later, defendant's attorneys suggested that the partition suits should not be commenced until after the appointment of an administrator on January 6, 1916. Plaintiff, in the meantime, after being advised that the defendant did not possess abstracts of the lands to be partitioned nor correct descriptions of the same, had procured abstracts to be made at his own expense, and made all arrangements to begin the partition suits in Cass and Griggs counties, where the lands were situated, advising defendant's attorneys of all the steps taken by him. After the beginning of the partition suits a demurrer was filed in the district court of Cass county and sustained by that court. Plaintiff perfected an appeal from the order sustaining the demurrer, and this court, in *Honsinger v. Stewart*, 34 N. D. 513, 159 N. W. 12, affirmed the order. Pending the appeal in the partition suit, there was an application to the judge of the probate court of Cass county for the sale of the same real estate in the administration proceedings, the plaintiff appearing therein to object to the sale, at every step advising defendant's attorneys as to his action, even suggesting to them as follows: "If our client is in a hurry to have the matter determined through the probate court, I suppose we might stipulate to abandon our suit and the appeal, and if my disbursements were paid with a reasonable sum for the service I have rendered up to the present time, and I am authorized to enter into a stipulation of that kind, we might facilitate the sale in the probate court. What I fear is a sale below the value of the lands." In reply to this letter, defendant's attorneys advised the plaintiff that their client did not desire to interfere or suggest the course that he should take, and that he was not disposed to do otherwise than was determined at the outset. They also indicated that Hollister, who had been an agent for Honsinger, deceased, was hostile to their client, the defendant, and that their client was suspicious of any proposition for a private sale. Throughout the subsequent correspondence, it appears that the attitude of the defendant was one of suspicion di-

rected toward the other heirs, and particularly at his brother-in-law, Stewart, and Hollister, who appeared to action for them; also that he objected to any sale other than a public sale. But yet it appears that, at the same time, the defendant was negotiating with Hollister for the sale of the land, having begun as early as January, 1916, and that the defendant actually signed a deed on November 15, 1916, deeding his lands in Cass county to a purchaser procured at private sale. After this date, the plaintiff, still representing the interests of the defendant, of which he advised defendant's attorneys, in an appeal to the district court from an order of the probate court directing a sale of the lands, arranged for the trial of the matter in the district court. It was not until about the time this appeal was tried that the defendant's negotiations with the party supposedly adverse to him were made known to the plaintiff.

While it is true that, in a power of attorney given, and throughout the correspondence, the plaintiff indicated that he would not become personally bound for the payment of expenses and fees, it is also true that he manifested a strong disinclination to yield to any proceedings looking toward a private sale, and that he, in fact, looked with disfavor upon any proposition that was apparently satisfactory to the other heirs and their agent, Hollister. It is also apparent that he did not act with that degree of fairness and good faith toward the plaintiff which would be expected from one in whose behalf litigation was being conducted upon a contingent basis. Moreover, it appears that the success of the plaintiff's efforts to prevent a private sale were thwarted by the action of the defendant himself, whose negotiations with Hollister were introduced in evidence in the district court on the trial of the appeal from the order of the probate court; and even more than this, it appears that the defendant has availed himself of the opportunity afforded by the pendency of the litigation to make a sale on more advantageous terms than he felt could or would have been made had he remained passive. Having adopted the plaintiff's services to this extent, we feel that he, in equity and good conscience, is obliged to pay the plaintiff the reasonable value thereof and to reimburse him for the necessary expenses incurred. There is no contention that the judgment is excessive; and the finding of the jury in favor of the plaintiff being warranted by the whole evidence, as we

view it, no error was committed in denying the motion appealed from or in entering the judgment.

The judgment is affirmed.

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NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Respondent, v. BISMARCK COMMISSION COMPANY, a  
Corporation, Appellant.

(171 N. W. 623.)

**Landlord and tenant—right of way—termination of tenancy at will.**

The plaintiff brings this action to recover possession of a part of its right of way. In justice court and in district court the decision was given for the plaintiff, and defendant appeals. Manifestly the defendant held over contrary to the terms of his lease, which contained an express agreement that either party might terminate the same on written notice of thirty days. Judgment affirmed.

Opinion filed February 3, 1919.

Appeal from the District Court of Burleigh County, Honorable W. L. Nuessle, Judge.

Affirmed.

W. L. Smith, for appellant.

The defendant and the appellant occupied the premises under a written lease from year to year, was tenant for an uncertain number of periods of time of twelve months' duration each. Tiedeman, Real Prop. 3d ed. ¶ 164; Washb. Real Prop. ¶ 798; 24 Cyc. p. 1028; Gear, Land. & T. §§ 29 to 33; Kaufman v. Mastin (W. Va.) 25 L.R.A. (N.S.) 855; Hunter v. Frost (Minn.) 49 N. W. 327; 2 Bouvier's Law Dict. "Tenant;" Comp. Laws 1913, §§ 5901, 6095.

Müller, Zuger, & Tillotson, for respondent.

"When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal and of no benefit to him." See also Lindeke v. McArthur

(Minn.) 145 N. W. 399; Fink v. Weinholzer (Minn.) 123 N. W. 931; Porter v. Tull (Wash.) 22 L.R.A. 613; Wreford v. Kenrick (Mich.) 65 N. W. 234.

ROBINSON, J. The plaintiff brings this action to recover possession of a part of its right of way. In justice court and district court the decision was given for the plaintiff, and defendant appeals. To the writer it is entirely manifest that the several appeals were not taken in good faith, and that the appeals were only for the purpose of delay.

On May 3, 1907, the plaintiff made to defendant an indefinite term lease or license, by which, in consideration of \$25 a year, it leased to the defendant a part of its right of way in the city of Bismarck for the purpose of doing a general produce, commission, and storage business. In the lease it was expressly agreed "the railway company may terminate the lease at any time, upon written notice of not less than thirty days, with or without assigning any reason therefor; and the lessee may terminate the lease by giving thirty days' notice in writing to the land commissioner of the railway company, at his office in St. Paul, Minnesota." Accordingly on May 25, 1917, there was personally served on defendant a written notice to terminate the lease in thirty days and a request for defendant within that time to remove from the premises. So the lease expired on June 25, 1917. Then on July 18, 1917, at Bismarck, there was served on defendant a statutory notice to quit the premises, and on July 24, 1917, the action was commenced in justice court.

Contrary to the express terms of the lease defendant insisted that it was a lease from year to year, and that it could be terminated only at the end of each yearly period. Defendant also insisted that under the lease he had paid \$25 as rental for the year ending January 31, 1918, and that by reason of accepting the rent plaintiff could not return the same for the unexpired portion of the year and terminate the lease before the end of the year. The lease or license was fairly made for a nominal consideration, and under it defendant had held possession for several years. Manifestly it was competent for the parties to contract for the termination of the lease by a written notice of thirty days, and by such notice the lease was duly terminated June 25, 1917.

Obviously the defense has not the least merit. The judgment is affirmed, with costs, and the case is forthwith remanded.

Affirmed and remanded.

GRACE, J. I concur in the result.

BRONSON, J. (specially concurring). Although I concur in the conclusion that the judgment of the trial court should be affirmed, I am nevertheless compelled to disagree with the language used in the majority opinion.

I think it wholly improper for this court to find that this appeal was not taken in good faith, and was made only for the purpose of delay. The record presents a square issue, fairly presented, concerning the interpretation to be placed on a stipulation in the lease; reflection should not so be cast upon the attorney for the appellant, an officer of this court in good standing, unless the record shows a palpable abuse of the right of appeal.

On May 3, 1907, the plaintiff made to the defendant a lease whereby it demised to the defendant certain premises on its right of way in the city of Bismarck; the lease provided for an annual rental of \$25 payable in advance, together with payment of taxes and assessments levied against the premises during the term. The lease used the terms "lessor" and "lessee;" required occupancy within three months after the date of the lease, and provided against assignment or subletting without the consent of the plaintiff; by agreement this lease was slightly modified as to the premises covered on August 2, 1907 and on December 1, 1908. The lease contained the further specific provisions, to wit: "The railway company may terminate this lease at any time upon written notice of not less than thirty days, with or without assigning any reason therefor. Any such notice shall be good if served personally upon the lessee, or posted upon the leased premises, or if deposited in a United States postoffice addressed to the lessee at the following address, viz.: Bismarck, North Dakota. If the lessee shall fail to remove any material, building, or property within the time prescribed in a notice of termination, the railway company may appropriate such property to its own use without compensation, or may remove the same at the cost of the lessee."

The lease did not specify any term. At the heading thereof, there occurred the printed term, "indefinite term lease." The majority opinion terms this instrument an indefinite term lease or license. It is clearly not a license or a mere privilege.

The appellant contends that the instrument created a tenancy from year to year. In this contention the appellant is correct. This instrument bears all of the ear-marks necessary to create the tenancy, known in law as a tenancy from year to year. It uses the formal words of a lease, there is a rent reserved payable annually as an annual rental; it contains a provision against assignment or subletting. Consequently it was not a pure tenancy at will. *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; 24 Cyc. 1027; *Jones, Land. & T.* §§ 215 et seq. As a tenancy from year to year, there existed a demise of the premises for the current year, with the privilege of a recurrent period, unless terminated by notice as provided for in such cases, or as otherwise changed by statutory rule. The only question involved in this case is, whether the express provision contained in the lease providing for notice to terminate the same is a provision for termination of this lease by notice so as to end the same at the expiration of one of these recurrent periods, or is an express stipulation to be construed as a contingent limitation, fixing definitely the termination of the lease upon giving the required notice.

I am of the opinion that this written stipulation was a limitation which fixed the period when the lease might be determined. I arrive at this conclusion from the express provisions of the stipulation, which provide that the plaintiff may terminate such lease at any time, upon the notice of thirty days with or without assigning any reason therefor. It is similar to provisions sometimes contained in leases, even in leases for years, whereby a lease may be terminated where the lessor desires to sell or desires to rebuild on the premises. As a limitation it served to fix a time when this lease could be absolutely terminated. The fact that the lessor specifically stipulated for termination at any time, with or without cause, prescribed a conditional limitation absolutely within the discretion of the lessor, and therefore this stipulation served to change the ordinary construction placed upon the statutory rule, or on the general principle of the common law concern-



ing terminations of tenancies from year to year by notice given. *Jones, Land. & T.* § 115; *Ann. Cas.* 1916B, pp. 306, 314, note.

The judgment accordingly should be affirmed.

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STATE OF NORTH DAKOTA, Respondent, v. FRANK FINLAYSON, Appellant.

(170 N. W. 910.)

**Jury trial—contempt under prohibition.**

1. In a contempt proceeding under § 10,118, *Comp. Laws* 1913 (the prohibitory law), the party charged with contempt is not entitled to a trial by jury. *State v. Markuson*, 5 N. D. 147, 64 N. W. 934, id. 7 N. D. 155, 73 N. W. 82, reaffirmed.

**Jury—contempt—constitutional rights.**

2. One charged with such contempt of court is not entitled to a jury trial as a matter of right. And § 10,118, *Comp. Laws* 1913, providing for trial by the court, without a jury, on an inquiry for contempt, does not contravene the constitutional provisions relating to a trial by jury.

**Procedure in trial for contempt—under prohibition law—provisions of Code of Civil Procedure not applicable.**

3. The procedure in contempt cases arising under the prohibitory law of the state is governed by the special provisions founded in such law, and the provisions of the Code of Civil Procedure relating to contempts in general do not govern in contempt cases arising under the prohibitory law.

**Contempt—sufficiency of affidavits.**

4. For reasons stated in the opinion, the affidavits on which the contempt proceeding is based are *held* sufficient and the acts based thereon are sustained.

**Violation of injunction.**

5. For reasons stated in the opinion it is *held* that the trial court did not err in holding the injunctive order, which defendant was charged with having violated, to be in force.

**Contempt—Statute of Limitations.**

6. For reasons stated in the opinion it is *held* that the contempt charged is not barred by the Statute of Limitations.

**Contempt proceedings—former conviction.**

7. In an affidavit filed as a basis for a warrant of attachment in a contempt proceeding under the prohibitory law of the state wherein the defendant is

charged with contempt as a second offense, the former conviction need not be set forth at length, but a brief allegation of such conviction is sufficient.

Opinion filed November 4, 1918. Rehearing denied February 4, 1919.

Appeal from the District Court of Burleigh County, *Coffey*, Special Judge.

The defendant, Frank Finlayson, was convicted of criminal contempt for having violated an injunctional order which enjoined him from maintaining a liquor nuisance, and appeals from the judgment.

Affirmed.

*Theodore Koffel*, for appellant.

In a criminal proceeding the defendant is entitled to all the rights and benefits provided for in the trial of criminal cases and entitled to a trial by jury. N. D. Comp. Laws, §§ 8184, 10,117, 10,119; N. D. Const. §§ 7, 13, art. 1; Fed. Const. Amendment, art. 5; *Barry v. Truax*, 13 N. D. 131, 99 N. W. 769; *Smith v. Kunert*, 17 N. D. 120, 45 N. W. 76.

Statements made on information and belief not sufficient in affidavit on which criminal prosecution is based. *Keappler v. Bank*, 8 N. D. 411, 79 N. W. 871; *State v. M'Gahey*, 12 N. D. 535, 97 N. W. 865; *State v. Root*, 5 N. D. 487, 57 N. W. 590; *State v. Harvey*, 16 N. D. 151, 112 N. W. 52.

*Wm. Langer*, Attorney General, and *F. E. McCurdy*, State's Attorney, for respondent.

CHRISTIANSON, J. In July, 1915, an equitable action was commenced by the state's attorney of Burleigh county, against the defendant, Frank Finlayson, and one John B. Hoagland, under the provisions of the prohibitory laws of this state for the purpose of abating a certain common nuisance which it was alleged that the defendant, Frank Finlayson, was keeping and maintaining on lots 20 and 21 of block 41 of the original town site of the city of Bismarck.

The complaint was in the usual form, and prayed the usual temporary injunction, which was issued, restraining the defendant, his agents, attorneys, and servants, until the further order of the court, from using or permitting the premises in question to be used "as a

place where intoxicating liquors are or may be sold, bartered, or given away as a beverage, or a place where persons are or may be permitted to resort for the purpose of drinking intoxicating liquors as a beverage; or a place where intoxicating liquors are kept for sale, barter, or delivery, in violation of law." The papers in the case—summons, complaint, injunctive order, affidavit for search warrant, and search warrant—were served upon the defendant on August 28, 1915. In April, 1917, the then state's attorney of Burleigh county by affidavit brought to the attention of the court the fact that the defendant, Frank Finlayson, has violated and was violating the terms of the temporary injunction, in that he had sold intoxicating liquors on said premises, and had continued to keep a place thereon where persons were permitted to resort and did resort for the purpose of drinking intoxicating liquors as a beverage.

The affidavit of the state's attorney recited a former conviction for contempt under the same statute, and asked that a warrant of attachment issue, and that defendant be arrested and brought before the court to answer for contempt of court. The state's attorney's affidavit was accompanied and corroborated by the affidavits of F. L. Watkins, Frank Toron, and Anton Melum. Upon these affidavits an attachment for contempt was issued against the defendant, and he was brought before the court.

Upon being arraigned, the defendant moved that the attachment be set aside and quashed. The motion was denied, and the court proceeded to hear the matter. Evidence was introduced by both the state and the defendant. The court made findings of fact and conclusions of law against the defendant, and judgment was pronounced thereon, declaring defendant guilty of contempt of court, as of a second offense, and sentencing him to imprisonment in the penitentiary for a term of two years. The case comes to this court on defendant's appeal from the judgment. No statement of the case was settled, and no question is raised as to the sufficiency of the evidence to sustain the findings, or the sufficiency of the findings to support the judgment.

Appellant's first contention is that § 10,118, Comp. Laws 1913, under which defendant was convicted and sentenced, is unconstitutional for the reason that it denies to one proceeded against thereunder a trial by jury. The question raised is not a new one in this jurisdic-

tion. In *State v. Markuson*, 5 N. D. 147, 64 N. W. 934 (decided October 28, 1895), this court, after a thorough consideration, held that, "in contempt proceedings under the statute above mentioned, the party charged with contempt is not entitled to have the charge tried to a jury." The principle was reaffirmed in *State v. Markuson*, 7 N. D. 155, 73 N. W. 82, wherein a judgment sentencing the defendant to imprisonment in the penitentiary for contempt of court, as of a second offense, was affirmed. These former decisions are a complete answer to appellant's contention in this case, and we shall refrain from entering into any discussion of the question further than to say that the principle announced in such former decisions has been accepted as the settled law in this state for more than twenty years, and meets with our approval, and has the support of the authorities. See *Woollen & Thornton, Intoxicating Liquors*, § 1232; *Joyce, Intoxicating Liquors*, § 612; 9 Cyc. 47; 4 Enc. U. S. Sup. Ct. Rep. 539.

Appellant also asserts that the proceedings against him were irregular; that the judgment should be reversed, because he was not served with a copy of the warrant of attachment and the affidavits on which it was based; and that no written interrogatories were filed "specifying the facts and circumstances of the offense charged against him." In short appellant argues that the contempt proceedings in the case at bar are governed by art. 3, chap. 35 (§§ 8181-8201), Comp. Laws 1913, and cites *Noble Twp. v. Aasen*, 10 N. D. 264, 86 N. W. 742, in support of the proposition that under these provisions one being prosecuted for contempt, unless he admits the offense charged, is entitled to have interrogatories filed "specifying the facts and circumstances of the offense charged against him," and that the right to have such interrogatories filed is not waived by mere silence or failure to object to the proceedings on the ground that none have been filed.

The case cited does not support appellant's contention. On the contrary the holding in that case is expressly restricted to contempt cases properly triable under the provisions of the Code of Civil Procedure relating to contempts, and the court specifically disclaimed any intention of holding those provisions applicable to contempt proceedings initiated under the provisions of the state prohibitory law. And in the case of *State ex rel. Morrill v. Massey*, 10 N. D. 154, 86 N. W. 225 (decided contemporaneously with *Noble Twp. v. Aasen*), the

court expressly stated that the procedure in contempt proceedings for violation of injunctions issued under the state prohibitory law was governed by the special provisions found in the prohibitory law, and that the general procedure in contempt cases prescribed by the Code of Civil Procedure is not applicable to contempt proceedings under the prohibitory law. In this connection it is well to note that the state prohibitory law expressly provides that "in contempt proceedings arising out of the violation of any injunction granted under the provisions" of such law, "the defendant may be required to make answer to interrogatories, either written or *oral*, as in the discretion of the court or judge may seem proper." Comp. Laws 1913, § 10,118.

Appellant also assails the affidavits which formed the basis for the warrant of attachment. It is asserted that the affidavits are evasive and indirect, and do not set forth facts sufficient to constitute contempt. As already stated, there were four affidavits filed. The affidavit of the state's attorney, McCurdy, stated fully and in detail and positively all the facts relative to the commencement of the equitable action for the abatement of the nuisance, the issuance of the injunction, the service of all papers upon the defendant; also, that "said injunctive order so made has not been dissolved or modified," and "that heretofore, namely, on the 19th day of April, 1911, the said Frank Finlayson was convicted in the district court of Burleigh county, North Dakota, before Honorable W. H. Winchester, judge of the said sixth judicial district, of the crime of contempt of court, violating an injunctive order duly issued by the said W. H. Winchester running to Frank Finlayson and others restraining them, and their clerks, servants, and employees, and each of them, during the pendency of a certain action then pending, from selling or disposing of intoxicating liquors as a beverage at other premises in the county of Burleigh, state aforesaid; and that pursuant to said conviction said Frank Finlayson was, on the 9th day of April, 1911, duly sentenced, and that formal judgment was entered against him on the 24th day of April, 1911, for contempt of court." The state's attorney further states in his affidavit that he is informed and believes that said Frank Finlayson has disregarded and disobeyed the injunctive order and mandate of the court in this,—“that on the 24th day of November, 1916, on the premises aforesaid he sold beer to one F. L. Watkins, and that during

the month of January, 1917, on the premises aforesaid he, the said Frank Finlayson, sold whisky to one Anton Melum, as a beverage, and that continuously since the 31st day of July, 1915, the said Frank Finlayson has kept a place at and upon the premises aforesaid, and in which said place persons were permitted to resort and did resort for the purpose of drinking said intoxicating liquors as a beverage."

As already stated there were three corroborating affidavits signed respectively by F. L. Watkins, Frank Toron, and Anton Melum. These corroborating affidavits were attached to, and by reference thereto specifically made a part of, the state's attorney's affidavit.

The material part of the affidavit of Watkins was as follows: "F. L. Watkins, of lawful age, being first duly sworn, says: 'I know the defendant, Frank Finlayson, and have seen him at this place of business; said business is that of a liquor dealer in the city of Bismarck, in the county of Burleigh, and state of North Dakota, at lots 19 and 20 in block 41, original plat of the city of Bismarck, and at the building located thereon. I was at his place of business on November 24, 1916, at which time and in which place I bought four bottles of beer, which was intoxicating liquor.'"

The affidavit of Frank Toron is identical with the above affidavit, with the exception of the last sentence therein, and instead of such sentence the Toron affidavit contains the following: "I was at his place of business on March 15, 1917, at which time and in which place I saw William Bones buy whisky, which was intoxicating liquor."

The Melum affidavit states in part: "I bought whisky from Frank Finlayson at said place many times."

The record also contains an affidavit by F. L. Watkins, signed April 9, 1917, and filed before the taking of any testimony, which contains this positive averment: "I was at his (Finlayson's) place of business November 24, 1916, at which time and place I bought four bottles of beer from Frank Finlayson."

In State v. Heiser, 20 N. D. 357, 127 N. W. 72, this court was called upon to determine the sufficiency of affidavits constituting the basis for an attachment. An examination of the affidavits involved, and held to be sufficient, in that case will disclose that the affidavits assailed in the case at bar present a stronger positive showing of violation by the defendant of the injunctive order than those involved and

sustained in the Heiser Case. And on the authority of that case, the affidavits in this case are held to be sufficient.

One of the grounds of defendant's motion to quash the warrant of attachment was that the equitable action had been dismissed, and hence, that the injunctional order which defendant was charged with violating had been annulled and set aside. In support of this proposition defendant submitted certain affidavits to the effect that H. R. Berndt, the state's attorney who instituted the equitable action, stated to the defendant in June, 1916, that such equitable action would be considered as dismissed, and that as soon as he (Berndt) could conveniently do so he would draw papers dismissing the case. Berndt, who was succeeded by McCurdy as state's attorney in January, 1917, died before the contempt proceedings were instituted, and no action had been taken by him for a dismissal, and there was absolutely nothing to indicate any intention on his part to dismiss the equitable action, but it remained pending to all intents and purposes; and (without expressing any opinion as to the propriety of the procedure adopted) we are wholly agreed that the trial court committed no error in refusing to quash the warrant of attachment on the affidavits submitted by the defendant in support of the motion to quash. In this connection it should be noted that, while no statement of the case has been settled, the clerk's minutes of the trial show that in all fourteen witnesses were called and examined in behalf of the state (including Watkins, Toron, and Melum, the three witnesses who made the corroborating affidavits, and that three witnesses were called and examined in behalf of the defendant. Inasmuch as no statement of case has been settled, we have no means of knowing what the different witnesses testified to, and must assume that the evidence adduced justified the court in making the findings it did. The findings show the commencement of the equitable action, the issuance of the temporary injunction therein, and the service thereof, together with the other papers upon the defendant, and the violation of the terms of the injunction by him; also, the former conviction of the defendant as set out in the affidavit of the state's attorney. The sufficiency of the findings is not questioned. And as already indicated, there is no contention that the evidence is insufficient to sustain the findings.

Appellant also contends that the warrant of attachment should have

been quashed for the reason that more than two years had elapsed since the alleged dates of the alleged offenses set out in the affidavits upon which the injunctive order was issued, and that any action thereon is barred by the statute. Appellant's contention is clearly untenable. In this case the defendant is not asked to answer for the acts specified in the affidavits upon which the injunctive order was issued, but for acts committed subsequent to the issuance, and violative of the terms, of the injunctive order. The affidavits which formed the basis for the warrant of attachment stated that the acts of the defendant which constituted contempt of court were committed in November, 1916, and in March, 1917. Manifestly these acts were alleged to have been committed within a period of two years prior to April, 1917.

Appellant also contends "that there is no allegation in the records anywhere as to any former conviction of a similar crime, and that therefore it was error to find him guilty of a second offense and punish him accordingly." We have already set out the portion of the state's attorney's affidavit alleging the former conviction. The allegation is clearly sufficient. Comp. Laws 1913, § 10,128; State v. Webb, 36 N. D. 235, 162 N. W. 358.

This disposes of the questions presented on this appeal, and it follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). The defendant was by affidavit charged with the crime of maintaining for the second time a common nuisance contrary to the statute and the order of the court. He was not prosecuted by indictment or information; he was denied a trial by jury, and in a summary manner he was convicted and sentenced to serve in the penitentiary for two years. He appeals to this court, claiming that the conviction is erroneous and without jurisdiction.

By statute whenever a district judge forbids the keeping of such is declared a common nuisance. For the first offense the punishment is not less than \$200 nor more than \$1,000, and imprisonment in the county jail not less than ninety days nor more than one year. For the



second and each subsequent offense, the punishment is not less than one year nor more than two years in the penitentiary. § 10,117.

By statute whenever a district judge forbids the keeping of such a common nuisance, then any person keeping the same contrary to the statute and the order of the court is guilty of a crime named a contempt. For such offense a person may be prosecuted, convicted and sentenced to the penitentiary without any indictment or information and without a trial by jury. The conviction may be on bogus and hearsay affidavits, which are made presumptive evidence of guilt. The accused may be required to answer questions concerning his guilt and to testify against himself. He may be punished for the first offense and for the second offense to the same extent precisely as if no injunctive order had been issued. This procedure is a recent discovery, and a most insidious contrivance for evading the right of trial by jury and for securing a conviction where a jury might fail to agree. A partisan statute names the crime a contempt, and then provides for a trial of the same in a summary manner. Under the statute when a person is accused of committing a crime contrary to law and the order of the court, his right to a trial by jury is forfeited. The forfeiture depends on the form of the accusation, and not on the guilt or innocence of the accused. Though the accused be ever so innocent, he cannot demand a trial by jury.

Of course the imprisonment of two years is for the keeping of a common nuisance. Were it for disregarding the order of the district court, it would be no bar to a prosecution for the real and primary offense. For that offense the accused would still be liable to punishment by indictment or information, to conviction by a jury, and to imprisonment for two years. But no one claims that the purpose of the statute was to duplicate the offense and the punishment. Its purpose was to convict the accused in the most summary manner without a trial by jury. And hence, the crime was named a contempt. Under a similar statute giving the same name to any other crime, a person might be accused and convicted of any crime, such as the contempt of robbery, or the contempt of murder.

In this case we should try to form a clear perception of the distinction between a trial for a crime and a summary contempt procedure. A crime or public offense is an act which the law forbids and punishes

with death, imprisonment, or fine. Comp. Laws, § 10,385. A crime is an offense against the state and the state alone may punish or condone it; a contempt of court—so far as it is not a crime—is an offense against the court or judge, and he alone may punish or condone it. A crime is punishable according to the law of the land; a contempt—so far as not a crime—is punishable only according to the will of the contemned judge. The same act, as the beating of a judge, may constitute both a crime and a contempt. In such a case, the judge may condone the personal offense, or punish it summarily by fine and imprisonment. And in accordance with the law of the land, the state may prosecute and punish the criminal offense. The summary punishment by an offended judge is merely a personal affair between him and the offender. It is not strictly a legal proceeding. It does never convict the offender of a crime or brand him as a criminal.

By statute in certain specified cases, a contempt of court is made a misdemeanor. § 9419. And in such cases a court of record may summarily punish the contempt by a fine not exceeding \$250 or by imprisonment not exceeding thirty days or both. §§ 8178, 8179. The statute fixes a definite limit on any summary punishment,—it says to the court, “Thus far mayest thou go, and no farther.” But when the state commences a prosecution to invoke and call down the penalties of the law, then its procedure must conform to the law and the Constitution; then the accused must have a trial by jury, and he cannot waive it. He cannot even by express consent give the judge jurisdiction to try the case.

When a prosecution is for a crime, then it is no summary matter, then it is not a word and a blow, then there must be a strict observance of these sacred guaranties of the Constitution.

Section 7. The right of trial by jury shall be secure to all and shall remain inviolate.

Section 8. All offenses shall be prosecuted criminally by indictment or information.

Section 13. No person shall be compelled in any criminal case to be a witness against himself.

We need not argue to prove that the right of trial by jury should forever be held sacred. Arbitrary power may not safely be given to any man. It makes him a tyrant and a despot, it ruins the character of a

judge. As Blackstone has written:—In settling and adjusting questions of fact, when intrusted to a single magistrate, partiality and injustice have ample field to range in; either by boldly asserting to be true that which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.

In the early days, one Markuson was summarily convicted of the crime of contempt and sentenced to the penitentiary for two years. The conviction was sustained by a specious and politic decision. *State v. Markuson*, 5 N. D. 147, 64 N. W. 934. And now in a stand pat way, without defending it, some of our justices seem disposed to follow the lead of that case. The reasons of the decision do not all appear in black and white. Here is the gist of the specious reasoning: It was not the purpose of the statute to punish for a substantive offense under the guise of punishing for contempt. At common law in a summary proceeding the courts had power to convict and imprison the accused for two years. That jurisdiction is inherent in the courts of this state. Hence the statute served no purpose only to give to the judges nerve and backbone.—Just think of it, two years in the penitentiary—the highest penalty of the statute, and still, as the court says, it was not the purpose to punish for a substantive offense!

Alas! then truth and candor wept.

And, at common law the courts never exercised any such jurisdiction. Furthermore, in contempt cases, the courts of this state have never had any common-law jurisdiction. The arbitrary power that judges once exercised as a part of the royal prerogative was never imported to the Dakotas. It was not in keeping with the western spirit of freedom, equality, and independence. Hence, the statute does justly fix a narrow limit to the arbitrary power of judges.

Finally, the questions presented are these:

1. Was the defendant convicted of the crime of keeping a common nuisance? Ans. Yes.
2. Was he under the statute convicted of a felony and sentenced to imprisonment for two years? Ans. Yes.
3. Was he prosecuted by indictment or information? Ans. No.
4. Did he have a trial by jury? Ans. No.

These direct questions and answers may not be artfully suppressed

or distinguished away or ignored ; they admit of no dispute, no evasion, no equivocation. *Under the Constitution, as it is, no person may be convicted of any crime and sent to the penitentiary without a trial by jury.* Hence, in this case the trial and conviction and sentence were in direct conflict with the fundamental law.

The majority decision has been given without any conference or discussion of the great questions of constitutional law presented by this dissent. It merely follows an old political decision, which is manifestly wrong. Indeed, it is a reproach to the court. It does manifest violence to the plain words of the Constitution. No judge or lawyer can honestly attempt to maintain that under our Constitution a person may be convicted of crime and sentenced to the penitentiary for two years without a trial by jury. No one can maintain that the guaranties of the Constitution may be changed or evaded by any name the legislature may choose to give to a crime. Hence, let us hope that on a motion to reconsider each judge of the court may declare the law in accordance with his oath and the Constitution, regardless of any political fear or favor.

Furthermore, "It is not within the province of a legislature to declare a person guilty or presumptively guilty of a crime." *McFarland v. American Sugar Ref. Co.* 241 U. S. 86, 60 L. ed. 904, 36 Sup. Ct. Rep. 498. Hence the legislature may not make an accusation presumptive evidence of crime.

Under § 10,118, Compiled Laws, defendant is charged with a second offense. The affidavit charging the offense is made presumptive evidence of guilt; the fine is excessive; it is not less than one nor more than two years in the penitentiary, and defendant is denied a trial by jury. For these reasons the statute is void; it is too drastic.

The minimum or lowest degree of the offense charged may consist of nothing more than the harmless sale of a few bottles of beer—a thing not *malum in se*—a thing legal and common in most countries, and not forbidden by Scripture. One year in the penitentiary is the least punishment for all crimes excepting treason, murder, manslaughter in the first and second degree, arson and burglary, forgery in the third and fourth degrees, grand larceny, perjury, manslaughter in the second degree, maiming, shooting with intent to kill, assault with intent to kill, robbery, dueling, assault with a dangerous weapon, rape in the

second degree, adultery, abortion, child stealing, bigamy, incest, sodomy, burglary in the third degree, and extortion.

Manifestly, the least penalty for such odious crimes is excessive when applied to the lowest grade of crime contrary to § 10,118. Hence, the statute is void for three reasons: (1) Its penalties are excessive; (2) it makes an accusation presumptive evidence of crime; (3) it denies the right of trial by jury.

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**K. E. EDWARDSON, Petitioner, v. LYDIA GERWIEN, Ruth Gerwien, a Minor, Fred Gerwien, Fred W. Gerwien, Edward H. Gerwien, Minnie Lau, Antonia Radke, Elizabeth Manke, Theresa Crosby, and N. G. Anderson, Treasurer of Mountrail County, North Dakota, and All Other Person or Persons That May Claim Any Interest in the Above Estate, Respondents, FRED GERWIEN, Fred W. Gerwien, Edward Gerwien, Minnie Lau, Antonia Radke, Elizabeth Manke, Theresa Crosby, Appellants.**

(171 N. W. 101.)

**Wills — publication.**

1. Subdivision 3 of § 5649, Comp. Laws 1913, is as follows: "The testator must at the time of subscribing or acknowledging the same declare to the attesting witnesses that the instrument is his will;" *held* that the word "declare" as therein used does not mean that the testator must declare by spoken words that the instrument is his will, but such declaration may be made by other means than the use of spoken words, such as the use of signs, gestures, or any other means by which the testator can convey and make known to the witnesses that the instrument which he signed is his will. The word "declare" as thus used, means to make known, to signify, to show in any manner either by words or acts.

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**NOTE.**—It seems to be well established that, to invalidate a will on the ground that the testator had insane delusions, the will must be the product of, or in some manner influenced by, the delusions; otherwise, the mere existence of delusions which do not affect the provisions of the will does not invalidate it, as will be seen by an examination of the cases collated in notes in 27 L.R.A.(N.S.) 62, and L.R.A. 1915A, 458, on insane delusions as affecting capacity or incapacity to make will.

On insane delusions and testamentary capacity in general, see note in 63 Am. St. Rep. 94.

**Wills — testator — delusions.**

2. Where one is contesting proof of a will on the ground that the testator at the time of making the will was possessed of certain insane delusions, it is not sufficient to introduce evidence which tends to prove the testator was possessed of such delusions. There should be further proof by the contestant to the effect that such alleged insane delusions have no foundation in fact or probability, in order to show that the delusion is wholly a product of the imagination; *held* in this case there is a failure of proof, there being no testimony introduced to show that the insane delusions alleged to have been possessed by the testator had no basis in fact or probability.

Opinion filed February 5, 1919.

Appeal from a judgment of the District Court of Mountrail County, North Dakota, *Frank E. Fisk, J.*

Affirmed.

*F. F. Wyckoff*, for petitioner.

*Charles Loring, G. A. Youngquist, and Alfred Halvorsen*, for Lydia Gerwien et al.

"The request may be valid, although made before a testator has signed the will, on a previous day, or after the witnesses have signed." 40 Cyc. 1115, 1116.

The request to the witnesses to sign may be made by words or signs. No particular form of request is necessary, and it may be implied from acts. 30 Am. & Eng. Enc. Law, 596; 1 Schouler, Wills, § 329; 40 Cyc. 1115, 1116; *Rogers v. Diamond*, 13 Ark. 474; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 607, 57 S. W. 526.

"Anything which conveys to the witnesses the idea that they are desired to be witnesses is a good request." 30 Am. & Eng. Enc. Law, 596; *Brown v. De Selding*, 6 N. Y. Super. Ct. 10.

"Any single act of the testator clearly indicating an intention to request the witnessing of such publication is sufficient." *Coffin v. Coffin*, 23 N. Y. 9; *Re Wooley*, 41 N. Y. Supp. 263; *Moore v. Moore*, 2 Bradf. 261.

"No particular form of words or acts of publication are necessary. Any communication to the witnesses, either by word, act, signs, or conduct, which makes it certain that the testator means the paper which he signs to be his will, is sufficient." 40 Cyc. 1117; *Re Wylie*, 57 App. Div. 574, 145 N. Y. Supp. 133, 162; *Ray v. Walton*, 9 Ky.

71; *Dean v. Dean*, 27 Vt. 746; *Brinkerhoofs v. Remsen*, 8 Paige, 488; *Re Buel*, 44 App. Div. 4, 60 N. Y. Supp. 385; *Lane v. Lane*, 95 N. Y. 494; *Hunn v. Case*, 1 Redf. 307.

Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact. 4 Cyc. 888; *Burrill*, Law Dict.; *International Trust Co. v. Anthon*, 45 Colo. 474, 22 L.R.A.(N.S.) 1002, 101 Pac. 781, 16 Ann. Cas. 1087; 6 C. J. 553; *White & Co. v. Magarahan*, 87 Ga. 217, 219, 13 S. E. 509.

"An insane delusion is a false belief, originating spontaneously in the imagination, without foundation either in fact or evidence, of the falsity of which the person affected cannot be convinced by argument or proof." 28 Am. & Eng. Enc. Law, 80; 40 Cyc. 1013; *Prinsep v. Sombre*, 27 L.R.A.(N.S.) 63.

*E. R. Sinkler* and *M. O. Eide*, for respondents and appellants.

"It is necessary that the testator declare to the attesting witnesses that the instrument is his last will." Comp. Laws 1913, § 5649; *Baskin v. Baskin*, 36 N. Y. 416, affirmed in 48 Barb. 200; *Re Lang*, 30 N. Y. Supp. 388; *Re Fusilier*, Myr. Prob. 40; 2 Code Rep. 153; *Seymour v. Van Wyck*, 6 N. Y. 120; *Burrit v. Stillman*, 16 Barb. 198; *Lewis v. Lewis*, 11 N. Y. 220, affirming 13 Barb. 17; *Hunt v. Mootrie*, 3 Bradf. 322; *Re VeVine*, 24 N. Y. Supp. 838; *Ruthford v. Ruthford*, 43 Am. Dec. 644; *Brown v. DeSelling*, 6 N. Y. Super. Ct. 10; *Auburn Theological Seminary v. Calhoun*, 62 Barb. 381; *Walsh v. Laffan*, 2 Dem. Sur. 498.

The rule that the intention must govern, which applies to the interpretation of wills, does not apply to their execution. 40 Cyc. 1097; *Thompson*, Wills, 440; *Schouler*, Wills, 257; *Re Walker*, 110 Cal. 387, 30 L.R.A. 460; 52 Am. St. Rep. 104, 42 Pac. 815; *Re Ritchier*, 25 Misc. 365, 55 N. Y. Supp. 642; *Re Arneson*, 126 Wis. 112, 107 N. W. 21; *Re Abercrombie*, 24 App. Div. 407, 48 N. Y. Supp. 414; *Re Noyan*, 40 Mont. 178, 105 Pac. 1013.

Where required by statute, there must be some declaration by the testator that the instrument is his will. 40 Cyc. 1117; *Schouler*, Wills, 326; *Thompson*, Wills, 445; *Remsen v. Brinckerhoff*, 26 Wend. 325, 37 Am. Dec. 251.

If the provisions in a will are based upon insane delusions it voids a will. *Hardenburgh v. Hardenburgh*, 109 N. W. 1014; *Swygard v.*

Willard, 76 N. W. 755; Medill v. Snyder, 58 Pac. 962; Schneider v. Vosburgh, 106 N. W. 1129.

The fact that the will accords with testator's previously expressed intentions is immaterial if founded upon a delusion. Ballantine v. Proudfoot, 22 N. W. 392; 60 Hun, —; 121 Ill. 376; Riggs v. American Home, 35 Hun, 658; Merriall v. Raston, 5 Redf. 220; Potter v. McAlpine, 3 Dec. 122; Benoist v. Murrin, 58 Mo. 307; Re Tittle, Myr. Prob. 12; Re Black, Myr. Prob. 24; Thomas v. Carter, 170 Pa. 272, 50 Am. St. Rep. 550, 33 Atl. 81; Townsend v. Townsend, 7 Gill, 10; Taylor v. Trich, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; Am. Seaman's Friend Soc. v. Hooper, 43 Barb. 625, affirmed in 33 N. Y. 619; Colhoun v. Jones, 2 Redf. 34; Re Shaw, 2 Redf. 107; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Wetter v. Habbersham, 60 Ga. 193; American Bible Soc. v. Prince, 115 Ill. 623; Thornteton v. Appleton, 29 Me. 298; Rivard v. Rivard, 109 Mich. 98; Ballantine v. Proudfoot, 62 Wis. 216.

GRACE, J. Appeal from the district court of Mountrail county, North Dakota, Frank E. Fisk, Judge.

The action is one which involves the construction of a will. A full statement of the facts will greatly aid in understanding the case. Herman Fred Gerwien of Mountrail county, North Dakota, died the 24th day of February, 1916, at Powers Lake, North Dakota. He left a will in writing which was his last will and testament, in which he appointed K. E. Edwardson as executor. His heirs at law were his father, five sisters, two brothers, and a niece. The testator died seised of certain real and personal property. The testator by will divided and bequeathed all his real property to Ruth Gerwien, daughter of Lydia Gerwien, and Lydia Gerwien, by specific bequests as shown by the will, and all of the personal property to Ruth Gerwien. The petition shows the probable value of the real estate to be \$3,500, and the yearly rents, profits, or income of the probable value of \$100. It also shows the value of the personal estate to be about \$1,600.

Objections were filed to the petition to prove the will by Lydia Gerwien, Fred W. Gerwien, Fred Gerwien, and Edward H. Gerwien. The cross petition was interposed by Edward H. Gerwien, Lydia Gerwien, Fred W. Gerwien, and Fred Gerwien. The case was first tried in the



county court and decree entered therein. From that decree, appeal was taken to the district court of Mountrail county by all the respondents excepting Lydia Gerwien and Ruth Gerwien. The trial was had in the district court and judgment was rendered admitting the will to probate and adjudging that the will was duly executed and published. From that judgment, the appeal was taken to this court by certain of the legal heirs other than Lydia Gerwien and Ruth Gerwien.

The questions presented in this appeal are: First, whether the testator made sufficient publication of his will; second, whether he had sufficient mental capacity at the time of the execution and making of the will to make the same. As to the first question relating to the proper and legal publication of the will, we are fully convinced, after a thorough examination of the evidence and the law relative thereto, that there was a sufficient publication of the will. Subdivision 3 of § 5649, Comp. Laws 1913, reads as follows: "The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will."

The will was properly executed. The testator properly signed it in the presence of two witnesses, each of whom witnessed the same in the testator's presence. What is the signification of the word "declare" as used in the above section? We are of the opinion that the word "declare" as used there signifies any act on the part of the testator which would show or make known to others, such as witnesses to the will or other persons present, that the instrument which the testator signed is his will, and that he understands and intends it as such. In declaring the same to be his will, the testator is not required to do so by words, but he may by other means than the use of words, such as the use of signs, gestures, or any other means by which the testator can convey and make known to the witnesses or others present that the instrument which he signs is his will. *Lane v. Lane*, 95 N. Y. 494. The word "declare" as used in our statute does not mean that one must speak. It means to make known, to signify, to show in any manner either by words or acts. This must be true, otherwise there would be many cases where the testator, having capacity to make a will, could not make one if the word "declare" in our statute means what appellant contends, which, in substance, is that the testator must audibly declare by spoken words that the instrument which he signs in the

presence of the witnesses thereto is his will. A person may have entire capacity to make a will, his mind may be clear, active, and intelligent, and we will assume that his capacity to make a will is such that it cannot be questioned; let us suppose, however, he has no power of speech by reason of paralysis; that his vocal organs are paralyzed and that he has no use of his tongue; that he has no power of articulation, the voice gives forth no sound. Can it be said that such a one, otherwise having full capacity to make a will, could not, in some other manner than by spoken words, make known to the witnesses to the will or others present that the instrument, which he has the power of reading and understanding and fully comprehends, is his will? We think it is self-evident that such one could by any other act which would convey his assent, and make known his understanding and approval of the instrument which he signs, declare the same to be his will, and a declaration thus made would be perfectly proper, entirely legal, and in harmony with the word "declare" as used in our statute. The testimony in the case by Edwardson, who was named as the executor of the will, Hesla and Olson, the attesting witnesses, is quite clear and convincing that the testator, by acts and signs other than spoken words, plainly and unmistakably declared the instrument, which he signed in their presence, to be his will. Authority which upholds what we have said in this regard is as follows: 40 Cyc. 1115-1116; 30 Am. & Eng. Enc. Law, 596; 1 Schouler, Wills, Exrs. & Admrs. 329; Rogers v. Diamond, 13 Ark. 474; Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 607.

We proceed to consider the second main question in the case. The appellant very strenuously contends that the testator at the time of the making of the will in question was without capacity to make it. This, for the reason that the testator is claimed to have been of unsound mind, in this that he was laboring under certain insane delusions, prominent among which, appellants claim, is that he believed that his relatives were striving to get his property away from him, and to starve him, and other alleged insane delusions which testator was claimed to have had for considerable length of time prior to and including the time of the making of his will. There was considerable testimony introduced at the trial for the purpose of proving that the testator was possessed of the insane delusions referred to. The very serious question

is: Even accepting all of such testimony at face value, giving to it full credence, is it sufficient as it now stands to prove, as a matter of law, the possession of such insane delusions by the testator at and before the time of the execution of the will? We will discuss but a single one of these alleged delusions and in the discussion endeavor to formulate the rule of proof that must be present to prove the actual existence of an insane delusion. We will assume it, therefore, to be a fact that, long prior to the time of the execution of his will and continuously up to and including the time of the making of his will, the testator did claim and did state in the presence of others and to others, that his relatives, other than the legatees, were striving to get his property from him. This is the strongest position that can be assumed for appellant's contention. Was this proof sufficient to prove an insane delusion in this regard? We certainly think not. We are of the opinion the appellants would have to go much further and prove that what was claimed to be an insane delusion, that is, that his relatives were striving to get all his property from him, was in fact false; that such statements of the testator with reference thereto had no basis in fact, and were not founded in reason or probability; that the matters claimed to constitute a delusion had no real existence, but were purely a product of the imagination. It would seem, if there were any evidence even though slight or inconclusive, which may have contributed to the belief held by one, claimed to be afflicted with the delusion, then his belief cannot be said to be a delusion. As we view the matter in this regard, there is a failure of proof. The appellants should have gone much further and have proved that there was no foundation in fact, none in reason or probability for the belief held by the testator; to wit that his relatives were striving to obtain his property. The delusion of which it was important to have copious proof in this case, such as we have indicated, was that relating to his relatives striving to get his property away from him. This, for the reason that the will dealt exclusively with that property. As it appears to us, the appellants have failed to furnish such proof as would warrant the court in saying that the belief of the testator in this regard was an insane delusion.

Neither can the court say that the testator was insane at the time he made his will. It must be presumed that he was sane until the contrary

appears by competent proof. There is no such competent proof in this record. It is true the evidence shows to some extent that the testator was filthy. Filthiness is not necessarily an evidence of insanity. The appellants also rely upon the circumstances that the testator for as much as two weeks at a time would lie in bed with his clothes on, including his overcoat, and for three or four days refused to eat. Keeping in mind the unfortunate condition of the testator, which existed at least for some considerable period of time, that he was afflicted with that most dreadful malady, pulmonary tuberculosis, it is not at all strange that he would lie in bed several days, nor that he kept his overcoat on at those times. There is no doubt but that his vitality was exceedingly low, more than likely his appetite was exceedingly poor. These and kindred symptoms as common knowledge tells us accompanying such a dread disease would be sufficient explanation for such matters as lying in bed in the manner claimed and refusing to eat, etc. Authority which intelligently discusses insane delusions may be found in 40 Cyc. 1013, 28 Am. & Eng. Enc. Law, 80. Neither is there any merit in the contention that the insane delusion which we have discussed finds any proof of existence in the fact that the testator willed all his property to Ruth Gerwien and Lydia Gerwien, her mother, the niece and sister of the testator, and was particular in his will to exclude all other relatives. The clause excluding the other relatives was a very proper one if he desired to exclude them from participation in his property, and the fact that the testator included that provision in his will in no manner strengthens the appellants' contention.

We are fully convinced that the judgment of the District Court should be affirmed, and it is affirmed, with statutory costs.

CHRISTIANSON, Ch. J. (concurring specially). Appellants contend that the will involved in this controversy is invalid: (1) Because there was no sufficient publication thereof; and (2) because the testator was insane and hence incapable of making a will. Both questions were decided against the contentions of the appellants both by the county and the district courts. And, in my opinion, the findings of the trial court are amply sustained by the evidence, and the judgment should be affirmed.

41 N. D.—33.

THEO. BOTNEN, Respondent, v. OLE G. ECKRE, Appellant.

(171 N. W. 95.)

**Landlord and tenant—conflicting claims of tenants—landlord and tenant—farm lease—when renewed by operation of law.**

1. In the instant case plaintiff and defendant both claim to be lessees of a certain tract of land, and hence each claims to be the owner of certain hay grown thereon during the year 1917. Evidence examined and *held*:

(a) That defendant had no lease for the premises for the season of 1917, nor was the lease which he held during 1916 renewed for the year 1917 by virtue of §§ 6092, 6094, 6095, and 6096, Compiled Laws 1913.

(b) That plaintiff has a valid lease and was and is the owner, and entitled to the possession, of the hay gathered upon said premises during 1917.

**Trials—trial de novo, when granted—findings of trial court presumed to be correct.**

2. Where an action properly triable by a jury is tried to the court without a jury, the supreme court will not try the case *de novo*, but the findings of the trial court are presumed to be correct. Appellant has the burden of showing error, and a finding based upon parol evidence will not be disturbed, unless shown to be clearly opposed to the preponderance of the evidence.

Opinion filed February 6, 1919.

From a judgment of the District Court of Richland County, *Allen, J.*, defendant appeals.

Affirmed.

*Forbes & Lounsbury*, for appellant.

"When there is no contract or usage to the contrary the rental paid for land is presumed to be for one year." Comp. Laws 1913, §§ 6092–6096.

"In replevin the value of the property at the time of its taking is the correct and only measure of damages." Comp. Laws 1913, § 7635; *Morris, Replevin*, p. 193; 34 Cyc. 1570, 1571; *Cobbey, Replevin*, p. 511; *Nichols & S. Co. v. Paulson*, 10 N. D. 440; *McLeod v. Capehart*, 52 N. W. 381.

*W. E. Purcell*, for respondent.

"In actions at law, unless the sufficiency of the evidence to sustain the findings, verdict, or judgment has been challenged in the lower

court, that question cannot be revived in the supreme court." *Morris v. Minneapolis, etc. R. Co.* 32 N. D. 366; *Buchanan v. Occident Elev. Co.* 33 N. D. 346.

"It is in equity actions only that the defeated party is entitled to a trial *de novo* in the supreme court, and it is only in such equitable actions that the supreme court will review the sufficiency of the evidence to sustain the verdict, without appellant making motion for a new trial in the court below." *LeClaire v. Wells*, 7 S. D. 426, 64 N. W. 519; *First Nat. Bank v. Comfort*, 4 Dak. 167, 28 N. W. 855; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192; *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310.

"When a law action is tried by the court, the findings of the court have exactly the same weight as the verdict of a jury, and must be given the same weight in the supreme court." *Jasper v. Hazen*, 4 N. D. 1; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257; *Ruettie v. Ins. Co.* 16 N. D. 546; *James River Nat. Bank v. Weber*, 19 N. D. 702; *State Bank v. Maier*, 34 N. D. 259; *Novak v. Lovin*, 33 N. D. 424.

"The supreme court will not review the evidence in a law action with a view of determining its weight, but only to ascertain whether or not there was sufficient legal evidence to support the verdict or findings." *Taylor v. Jones*, 3 N. D. 235; *Clemens v. Royal Neighbors*, 14 N. D. 116; *Houghton Imp. Co. v. Vavrowski* (N. D.) 125 N. W. 1024; *Hall v. N. P. R. Co.* 16 N. D. 60; *Walklin v. Horswell* (S. D.) 13 N. W. 668; *Casey v. First Nat. Bank* (N. D.) 126 N. W. 1011; *Olson v. Day*, 23 S. D. 150; *Mosteller v. Holborn*, 20 S. D. 245; *Grand v. Powers Dry Goods Co.* 23 S. D. 195; *Jackson v. Grand Forks* (N. D.) 140 N. W. 718; *Seen v. Steffan*, 37 N. D. 491; *Reed v. Ehr*, 36 N. D. 552.

CHRISTIANSON, Ch. J. This is an action to recover the possession of 50 tons of hay, or in case a recovery thereof cannot be had, the value thereof, which is alleged to be \$750. The answer is in effect a general denial. The case was tried to the court without a jury. The court made findings of fact in favor of the plaintiff, and fixed the value of

the hay at \$600. Judgment was entered upon the findings, and defendant appeals.

The evidence shows that the hay involved in this controversy was grown upon land belonging to one Hellestvedt. Some of the land was under cultivation and some of it was hay land. Hellestvedt by written power of attorney authorized one Ulsaker to rent the land. And for many years,—at least from 1905 to 1916, both inclusive,—Ulsaker had rented the land to the defendant, Eckre. A few years ago the defendant was permitted to fence a small portion of the premises. It appears that for every year,—with one, or possibly two, exceptions,—there was a written lease between the parties. The leases were identified upon the trial, but have not been transmitted to this court, so we have no means of knowing their terms. However, from certain statements made during the course of the trial it seems that they were ordinary farm leases, whereby the premises were leased for the farming season of a specified year. It also appears that Eckre was required to pay a certain cash rent for the hay. He was also required to plow back each year certain land which had been plowed when he first leased the premises. Eckre farmed the premises in 1916. And he claims that some time along in October, 1916, he leased the premises for the farming season of 1917, and hence became entitled to the hay in controversy. The alleged lease was oral.

Defendant's version of the conversation which he claims created the lease is as follows:

He (Ulsaker) asked me if I would get the land plowed that fall, and I told him it was so wet I wasn't going to get any plowing done,—I told him I simply couldn't plow, it was too wet, and then he said it would be in poor shape in the spring if it wasn't plowed in the fall; and I said we can, if the spring is good,—I will plow some of it in the spring, and if it ain't, why I will summer-fallow it; that is all that was said.

Q. What did he say about that?

A. Well, why I think he said, "All right" or something to that effect.

The defendant did not put any of the land into crop in the spring of 1917; nor did he plow any of it either in the fall of 1916 or in the spring of 1917. He did, however, commence to do some plowing about July 20, 1917.

On July 13, 1917, the plaintiff, Botnen, entered into a written "hay",

lease with Ulsaker, under the terms of which he became entitled to cut and gather all growing grasses on the premises. Botnen thereafter entered upon the premises and commenced to cut and stack the hay. The defendant, however, interfered, and (to use his own language) "chased him [Botnen] off." After driving plaintiff off the premises, the defendant proceeded to exercise dominion over the premises and appropriated all the hay to his own use.

Defendant claims that under the facts which existed on and prior to July 13, 1917, he (defendant) had become entitled to retain the premises for another year under the provisions of §§ 6092, 6094, 6095, and 6096, Compiled Laws 1913, and that consequently plaintiff's lease was and is invalid. The statutory provisions invoked read:

"6092. A hiring of real property, other than lodgings, in places where there is no usage on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring."

"6094. If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time not exceeding one year."

"6095. A hiring of real property for a term not specified by the parties is deemed to be renewed as stated in the last section at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month."

"6096. When there is no contract or usage to the contrary the rent of agricultural and wild lands is payable yearly at the end of each year. . . ."

In our opinion defendant's contentions are entirely without merit. It seems too clear for argument that the conversation between defendant and Ulsaker did not create a new lease or an extension of the existing one. It was defendant's duty to plow back certain land. This duty depended not upon whether defendant leased the premises for the season of 1917, but upon the terms of the lease under which he had been occupying the premises in 1916. The statutory provisions invoked have no application. The leases which defendant had received during the several years (so far as we can tell from the record before us) were



leases for the farming season of each year only. The defendant in this case paid no rent for 1917, and the landlord accepted no such rent. There is, in our opinion, only one conclusion which can be drawn from the evidence in this case, and that is the one which the trial court drew. And we have no hesitancy whatever in reaching the conclusion that the plaintiff was and is the owner, and entitled to the possession, of the hay described in the complaint, or the value thereof in event a delivery of the hay cannot be had.

Defendant also contends that the judgment is excessive. This action is one properly triable to a jury, and is not to be tried anew in this court. The findings of the trial court are based upon parol evidence. They are presumed to be correct, and will not be disturbed unless shown to be clearly opposed to the preponderance of the evidence. *State Bank v. Maier*, 34 N. D. 259, 158 N. W. 346. In this case there is a conflict in the evidence both as to the amount and value of the hay. There is evidence from which the court might have rendered a judgment against the defendant for even a larger amount. We see no reason for reducing the judgment. There is nothing to indicate that the defendant was not afforded a fair trial. The judgment appealed from is affirmed.

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**ALFRED EASTGATE, Appellant, v. OSAGO SCHOOL DISTRICT OF NELSON COUNTY, NORTH DAKOTA, a Public Corporation, Respondent.**

(171 N. W. 96.)

**Schools — compulsory attendance — transportation — school board — duty of — mandatory.**

1. Where a statutory law imposes upon school boards the mandatory duty of requiring each child between the ages of six and fifteen years of age to attend the public school for a specified time during each school year, and in that respect imposes a further mandatory duty upon the school board requiring

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NOTE.—For authorities discussing the question of duty of public to furnish free transportation to pupils, see note in 37 L.R.A.(N.S.) 1110.

On right to use school moneys for transportation of pupils, see note in 38 L.R.A. (N.S.) 710.

it to provide transportation to the school for all children between the ages of six and fifteen years of age, inclusive, who reside beyond the specified distance as prescribed by law when it becomes the mandatory duty of the school board to provide conveyance for such children to such school, it is the mandatory duty of the school board to ascertain and determine what children within the district reside beyond such specified distance from the school, and convey them to school in accordance with the requirement of the law providing for such transportation.

**School board — transportation — neglect to furnish — children — duty to transport — parents or guardian — compensation — school district.**

2. Where the school board fails, neglects, or refuses to furnish transportation for children between the ages of six and fifteen years, inclusive, in disregard of the provisions of law which make it their mandatory duty to do so, and where the parent or guardian or one lawfully charged with the custody and care of such children conveys them to the nearest properly equipped school within the district by the nearest public or lawfully traveled route, such service being accepted by the school district, the district is under an implied contractual obligation to compensate therefor.

Opinion filed February 7, 1919.

Appeal from the District Court of Nelson County, North Dakota,  
Honorable *Chas. M. Cooley*, Judge.

Remanded.

*Flynn & Traynor*, for appellant.

*R. J. Roberts* and *Frich & Kelly*, for respondent.

Trustees of a school district can bind the district only by a corporate meeting held as provided by law, and any attempt upon their part to perform their duties alone, and not in conjunction or jointly, is ineffectual and void. 35 Cyc. 901; *School Dist. v. Bennett* (Ark.) 13 S. W. 132; *Nason v. Directors of Poor* (Pa.) 17 Atl. 616; *People v. Smith*, 149 Ill. 549, 36 N. E. 971; *Herrington v. School Twp.* 47 Iowa, 11; *Mills v. Collins*, 67 Iowa, 154, 25 N. W. 109; *Kinney v. Howard* (Iowa) 110 N. W. 282; *Currie v. School District*, 35 Minn. 163, 27 N. W. 922; *State v. School Dist.* 22 Neb. 48, 33 N. W. 480; *Keeler v. Frost*, 22 Barb. 400; *State v. Liberty Twp.* 22 Ohio St. 144; *Kane v. School Dist.* (Kan.) 47 Pac. 561; *Blodgett v. Seals* (Miss.) 29 So. 852; *Terry v. Board of Education*, 84 Mo. App. 21; *Moore v. Leonard* (Tex.) 74 S. W. 324; *Honaker v. Board* (W. Va.) 32 L.R.A. 413, 24 S. E. 544; *State v. Leonard*, 3 Tenn. Ch. 177; *Short v. Langs-*

ton (Ky.) 102 S. W. 236; Byrne & Reed v. Covington (Ky.) 131 S. W. 260; School Dist. v. Fuesso, 98 Pa. 600; Butler v. School Dist. (Pa.) 24 Atl. 308; Rice v. School Dist. (Ark.) 159 S. W. 29; School Dist. v. Castell (Ark.) 150 S. W. 407; School Dist. v. Jackson (Ark.) 161 S. W. 153; Barber v. Hines (Ark.) 185 S. W. 455; Caxton Co. v. School Dist. 120 Wis. 374, 98 N. W. 231.

A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice by accepting or retaining the benefits of the act with notice thereof. Laws 1913, Comp. Laws, § 6331; subd. 5, chap. 267; 35 Cyc. p. 964, and cases cited.

Plaintiff's right to claim transportation under the 1913 statute was extinguished by the repeal of same in 1915. Henderson v. State, 58 Ind. 244; Bennet v. Hargus, 1 Neb. 419; Bailey v. Mason, 4 Minn. 546; Van Inwagen v. Chicago, 61 Ill. 31; Wirt v. Board of Supervisors, 35 N. Y. Supp. 887; Butler v. Palmer, 1 Hill, 324; Moor v. Seaton, 31 Ind. 11; Cushman v. Hale, 68 Vt. 444, 35 Atl. 382; Crawford v. Halsted, 20 Gratt. 211.

GRACE, J. Appeal from the district court of Nelson county, North Dakota, Honorable Charles M. Cooley, Judge.

This is an action by the plaintiff to recover the sum of \$440 for conveying his children from his home to one of the schools of the district located at the village of Pekin in said district, during the school years of 1912, 1913, 1914, and 1915. The school is alleged to be a distance of 5 miles by the nearest route from the residence of the plaintiff. The plaintiff testifies there was a school 2 miles south of them, which was  $3\frac{1}{4}$  miles by the nearest traveled route.

The answer alleges that there was a school No. 2 in said district which was equipped with necessary furniture, heating apparatus, and other equipment, which is located by the nearest traveled route within 2 miles from the residence of the plaintiff, in which were taught all the subjects required to be taught in an elementary school; that the school in Pekin, which is mentioned in the complaint, is a district high school composed of the entire township of Osago, and is not a consolidated school. The answer further alleges that plaintiff arbitrarily and without cause or necessity and without the knowledge, consent, direc-

tion, or approval of the defendant, except as to those attending high school, conveyed all of his children to and entered them in the Pekin school, and that during all of said time plaintiff well knew that defendant had made ample provision for the accommodation, teaching, and education of his said children who were at and during said time in the elementary grades in the elementary school No. 2. The answer further sets forth the number of days each of the children attended the school at Pekin during the different years hereinbefore referred to.

The questions presented in this appeal are few and simple. They are: 1. In the absence of a specific contract with the school board, may the plaintiff recover for the conveyance of his children to school, it appearing that they reside in a district where there is no consolidated school and at a distance from the school which entitles them to be conveyed thereto? 2. Does the right of such conveyance, under the conditions set forth in question 1, extend beyond the age of fifteen years? 3. To what school should the conveyance, if any, be made? The questions here presented arise under laws enacted for the compulsory attendance at school of children between the ages of six and fifteen, inclusive. It will also appear that during the time mentioned in the complaint, there were three different compulsory educational statutes in force. The first is subdivision 4 of § 232, chapter 263, of the Laws of 1911, the portion thereof which is germane to the issue here presented is as follows:

"If no school is taught the requisite length of time within  $2\frac{1}{2}$  miles of the residence of such child by the nearest route, such attendance shall not be enforced except in cases of consolidated schools where transportation may be arranged by the school board; provided that in districts where children live beyond the  $2\frac{1}{2}$  mile limit and school facilities are not otherwise provided, the district board *shall* provide transportation for such children to and from school."

Section 232 was amended by the legislature of 1913 to read as follows: "If no school is taught the requisite length of time within  $2\frac{1}{2}$  miles of the residence of such child by the nearest route, such attendance shall not be enforced except in cases of consolidated schools where the school board has arranged for the transportation of pupils. In every school district, where consolidated schools have not been established, the school board *shall* arrange a system of zones for the trans-

portation of children to and from school at the expense of the district. Children living within not less than one and one quarter miles nor more than two and one quarter miles from the schoolhouse by the nearest public route shall be in zone number one; children living within not less than two and one quarter miles nor more than three and one quarter miles from the schoolhouse by the nearest public route shall be in zone number two; and children living at a greater distance than three and one quarter miles from the schoolhouse by the nearest public route shall be in zone number three. In providing compensation for transportation, the school board *shall* provide a maximum compensation per family for the first zone, and compensation per family for transportation from zone number two shall be one half greater per family than for zone number one, and compensation per family for zone number three *shall* be twice the compensation per family for zone number one. Provided that when provision has been made for the transportation of pupils by the school board of any district agreeably to the provisions of this chapter, the pupils residing therein shall be amenable to the provisions of law requiring the attendance at school of such pupils." [Chap. 267, subd. 5.]

The same subject was again considered by the legislature in chapter 141 of the Session Laws of 1915, and the following law was enacted: "If no school is taught the requisite length of time within two and one quarter miles of the residence of such child by the nearest route, such attendance shall not be enforced except in cases of consolidated schools where the school board has arranged for the transportation of pupils. In school districts where consolidated schools have not been established, the school board *shall* pay a sum not to exceed 35 cents nor less than 15 cents per day to any one family living more than two and one quarter miles from the nearest school, which *shall* be equitably based upon the number of children attending school from each family; provided that the tender of such daily compensation *shall* be construed as furnishing transportation, and when such tender is made by the school board, the compulsory attendance law shall apply to all children of school age living more than two and one quarter and not to exceed 5 miles from school."

In some of the above laws, the words "nearest route" are used; where so used they are held to mean the nearest public route or one which

has been duly authorized or exists by law. The purpose of each of the above laws is to compel the parent or guardian, etc., to send to school children between the ages of six and fifteen. It does not undertake to compel parents or guardians to send children to school who are past the age of fifteen years. Hence no recovery can be had by the plaintiff for conveying children to school who had passed the age of fifteen years at the time of such conveyance, nor would the school board be warranted, under the present law nor other laws we have cited, in providing for the conveyance of children to school and payment therefor where they are past the age of fifteen years, in a district where there is no consolidated school. The plaintiff cannot recover for conveying any of the children to school who, at the time of such conveyance, were past fifteen years of age. The defendant, if liable at all, was so only for the conveyance of the children between the ages of six and fifteen. If the plaintiff had a right to have his children up to the age of fifteen conveyed to any school it was the school which was nearest to him; that is, school No. 2. We have now arrived at the solution of the first question. In the absence of a specific contract with the board for the conveyance of his children under the age of fifteen to the nearest school under the circumstances we have mentioned, it appearing he did convey them, may the plaintiff recover? We are of the opinion that he may, his recovery to be based on the law in force at the time of the conveyance of such children over the age of six and under the age of fifteen years to the nearest school. Each of the above laws, making it the duty of the school board to provide conveyance for children living beyond the specified distance from the nearest school, is mandatory. It is the duty of the board to provide such conveyance. It has no choice in the matter. It is the duty imposed upon it by the legislature, not only for the good and convenience of such children as come within its provisions, but also for the good of the state to the end that ignorance may be eradicated and the child developed into an intelligent and more useful citizen. With the exception of the Laws of 1911, the rates for transportation are provided for. It is the manifest duty of the school board, under each of said laws, to apprise itself of the number of children entitled to conveyance under any of the provisions of such laws. This is its plain duty. This being true, if it failed to do its duty, the plaintiff, owing a high duty to his

children and the state to educate his children, was justified in conveying them to the proper school, and should be entitled to recover within the limits prescribed by law for such conveyance for all children between the ages of six and fifteen years, such recovery to be had under the law in force at the time of such conveyance. The conveyance should be made to the nearest school, if that school is one where all the elementary branches are taught and is a fit place for the children to attend, that is, if it is reasonably comfortable, provided with reasonably good furniture, and is a place, in all respects, which the children might attend without endangering their health. We think it might be shown that the nearest school was not properly equipped, not properly furnished, heated, nor lighted, and that it would be detrimental and dangerous to the health of the children to send them to such school, and where such showing is properly made by competent testimony and found to be true by the court, the plaintiff would have the right to convey such children to the next nearest school, which was in proper condition, within the district.

It is a well-established rule that school boards act as a unit; that individual members thereof have not the power to contract; that their contracts must be made at regular meetings or at a special meeting called for this specific purpose, etc. With all such rules and decisions we are in full accord. It is also a general rule that where the school board acts upon matters within its discretion and within its jurisdiction, as, for instance, in matters concerning the corporate property, such action being taken at a proper time and place and in the manner provided by law, the action of the school board will not be interfered with. Such matters, however, are entirely different than a total disregard by the board of a mandatory duty imposed upon it by law. In the case at bar, it was its mandatory duty, under the law in force at the time of the conveyance, to provide a conveyance for such children that were between the ages of six and fifteen for attendance at the nearest properly equipped school, and having failed in the performance of its mandatory duty, and the plaintiff, having conveyed his children to school, though not the nearest school, we think the plaintiff is entitled to recover in accordance with the law then in force for the conveyance of his children to the nearest school, unless it be shown by competent testimony that that school was not properly equipped and was not a

fit place for the children to attend; and, in that event, then he to recover in accordance with law then in force for the conveyance of his children between the ages of six and fifteen to the next nearest school, in this case, the school to which he did convey them.

It is true that subdivision 4 of § 232, chapter 263, of the Laws of 1911, and the amendment to the same by the legislature of 1913, which provided for the zone system, are repealed by chapter 141 of the Session Laws of 1915, but they were, however, in force at the time plaintiff conveyed his children, over the age of six and under the age of fifteen years, to school. Their provisions in this regard were mandatory. Under the 1913 Laws, it was the mandatory duty of the school board to determine the zone. Under each of the laws to which we have referred, it was the mandatory duty of the board to furnish conveyance to children between the ages of six and fifteen years residing beyond the described point where it became the mandatory duty of the school board to provide such conveyance. If they failed to execute their mandatory duty as prescribed by law, one living beyond the point where the matter of conveyance became operative, and having children between the ages of six and fifteen years of which he was a parent or guardian, etc., could convey such children to the nearest properly equipped school, both with facilities as to education and health condition, and recover from the defendant for such conveyance within the terms specified in the respective laws to which we have referred.

The case is remanded for further proceedings in harmony with this opinion. Appellant is allowed the statutory costs on appeal.

BIRDZELL, J. (concurring specially). I concur in the conclusion that the judgment in this case should be reversed and a new trial granted for three reasons: First, because the court erred in excluding testimony offered, which, if admitted, would have tended to show that the arrangement for the transportation of the children of the plaintiff was made under the direction of the members of the school board; or, if directed by one of them, it was with the knowledge and consent of all, and that transportation was furnished by the plaintiff under circumstances importing knowledge not only on the part of the directors, but on the part of the individual members of the school corporation itself. Second, because testimony was excluded which would have



shown whether or not other persons in the district were compensated for transporting their children to the school. This testimony would have tended to establish the existence of an informal arrangement with the parents to transport their children. Third, for the reason that, under a proper construction of various sections of the statutes which provide for compulsory education and the conveyance of the pupils to the schools, it is made the duty of parents to send their children to school, and a correlative obligation is imposed upon school districts in certain cases either to provide transportation or to furnish monetary compensation as an equivalent. See §§ 84 and 232 of chapter 266 of the Session Laws of 1911, and, as later amended, §§ 1190, 1342, and 1344 of the Compiled Laws of 1913, and chapters 127 and 141 of the Session Laws of 1915.

The record discloses that the rulings of the trial court were made upon the theory that no recovery could be had in the absence of a formal contract entered into between the plaintiff and the school district, acting through its officers at a meeting. This, of course, is the general rule, according to which the contract liability of school districts and other municipal corporations must be determined, but it does not follow that a school district may not be liable as upon contract for benefits received for which no actual contract has ever been made; or that it may not be liable upon an oral contract actually made or upon an implied contract if shown to exist.

It is a settled law that a contract of a municipal corporation or a quasi municipal corporation need not be in writing unless there is some statute requiring it; also that such corporations may be bound by contracts made by those who are clothed with authority to act for it, such authority being delegated by the officers having power to act for the corporation. See 2 Dill. Mun. Corp. 5th ed. § 784. The law also recognizes and enforces the liability of municipal and quasi municipal corporations upon their implied contracts made within the scope of their powers, to the same extent that they would be liable on express contracts, provided always, however, that in enforcing the liability upon an implied contract no statute or rule of public policy, designed to protect the corporation against unauthorized or improvident acts of its officers or agents, is infringed. 2 Dill. Mun. Corp. 5th ed. § 793; 35 Cyc. § 964.

It has been held that a school district is liable for supplies furnished with the knowledge and consent of the directors and under circumstances which would raise a presumption that they were furnished with the common consent of the district. *Andrews v. School Dist.* 37 Minn. 96, 33 N. W. 217; *Kreatz v. St. Cloud School Dist.* 79 Minn. 14, 81 N. W. 533; 35 Cyc. 953. See also on the ratification of unauthorized contracts with teachers by the acceptance of benefits, 35 Cyc. 1085, and authorities cited. It is true that in *Bosard v. Grand Forks*, 13 N. D. 587, 102 N. W. 164, a distinction was made between the liability of a municipality upon an implied contract for services and a similar contract for material or property received. But, in view of the statutes, particularly § 1342 of the Compiled Laws of 1913, as amended by chapter 141 of the Session Laws of 1915, which clearly makes it the duty of the school board to arrange for the transportation of pupils,—even going to the extent of providing a minimum rate for transportation payable to the parents themselves,—I am of the opinion that the rule stated in the case of *Bosard v. Grand Forks*, *supra*, does not apply. There was no statute making it the duty of a committee of the city council to employ counsel, as was done in the *Bosard Case*, and it further appears that in that case there was a city attorney who was an appointive officer serving upon a salary, whose duty it was to perform the services for which the plaintiff sued. In the instant case the duty not only devolved upon the board to furnish transportation, but the 1915 statute, as stated above, even fixed the rate and provided, as a condition of compulsory attendance, that the amount specified be tendered to the parents. Neither does this case conflict with the case of *St. Luke's Hospital Asso. v. Grand Forks County*, 8 N. D. 241, 77 N. W. 598, where it was held that a county was not liable to one who voluntarily ministered to a pauper. The nonliability in this case was based upon the absence of a statute giving to the plaintiff the right to relieve the pauper at the expense of the county and upon the absence of any proceeding by officers authorized to give the relief at the expense of the county; while here, the statute (particularly the 1915 statute) runs in favor of the plaintiff, and there was evidence tending to show that the district knowingly accepted the benefits incidental to the discharge of its obligations to supply transportation, and this according to a method recognized by the statute as proper.

It is my opinion that, when a statute makes it the duty of officials of a municipality to perform a certain act in favor of one upon whom a general duty is imposed, such as devolves upon parents under our statute to send their children to school, the discharge of the latter obligation voluntarily does not put the beneficiary in any worse position in the eyes of the law than he would have been had he neglected his legal duty until compelled to perform it. To state the proposition another way,—one who voluntarily performs an obligation which the law imposes upon him is not, by reason of his voluntary act, to be deprived of the measure of compensation which the law itself contemplated shall be paid.

There are, however, some questions that will arise upon a retrial which are not free from difficulty, and the proper solution of them will depend upon the evidence adduced. If it should appear that the board of directors of the defendant school district had never, prior to the 1915 amendment to § 1342, Comp. Laws 1913, established a zone system or arrived at a definite basis for compensating parents for transporting their children to school, it is my opinion that there can be no recovery covering this period, for the reason that the statute left the amount of compensation to the discretion of the board. It is true that it is a discretion which the board could have been compelled to exercise, but if it should appear that it was not exercised, the plaintiff must fail because he did not resort to the remedy he had to compel the directors to exercise that discretion. For transportation supplied by the plaintiff, however, subsequent to the 1915 amendment, he would be entitled, under a proper showing, to at least the minimum rate prescribed in the statute. For an authority construing an analogous statute, see *School Dist. v. Atzenweiler*, 67 Kan. 609, 73 Pac. 927.

It is not intended to intimate that the sole source of proof that the school board had performed its duty of providing a rate of compensation for transportation is the minutes of the meeting. Any evidence which tends to establish that compensation was made according to some plan, and this, with the knowledge and consent of all the members of the board, may be sufficient to warrant a jury in finding that the directors had fulfilled their obligations in this respect, though not to the plaintiff. The statute does not require any particular formality, but, of course, it contemplates that any action taken shall be board action.

In the absence of a statute requiring that the action of the board must be attended with prescribed formalities, evidence which tends to show that the board had actually discharged the duties devolving upon it would be admissible as establishing a basis for a liability under the statute to the plaintiff in this action.

CHRISTIANSON, Ch. J. (dissenting). I dissent. There was no obligation at common law on the part of a school district to transport, or furnish transportation for, school children. The obligation is purely statutory. The duty is devolved by the statute upon the district school board. But the statute nowhere provides that, in case of neglect of duty on the part of the school board, the school district shall become liable as upon an implied contract to one who performs services in transporting school children. While the school directors are required to perform their statutory duty, and may even be required by mandamus to do so, it by no means follows that neglect on the part of the directors to perform their official duty operates as an implied request to some other person to perform services which the school directors should have contracted with someone to perform. Nor does it follow that the voluntary performance of such services creates any implied promise on the part of the school district to pay therefor. On the contrary the great weight of authority seems to sustain the proposition that a public corporation cannot be held liable as upon an implied contract for services under such circumstances. See *McQuillin, Mun. Corp.* § 2453; *Bosard v. Grand Forks*, 13 N. D. 587, 102 N. W. 164; *Morgan County v. Seaton*, 122 Ind. 521, 24 N. E. 213; *Patrick v. Baldwin*, 109 Wis. 342, 53 L.R.A. 613, 85 N. W. 274; *Buxton v. Chesterfield*, 60 N. H. 357, 360; *Park v. Laurens*, 68 S. C. 212, 46 S. E. 1012; *McCormick v. Niles*, 81 Ohio St. 246, 27 L.R.A.(N.S.) 1117, 90 N. E. 803; *Floyd County v. Allen*, 137 Ky. 575, 126 S. W. 124, 27 L.R.A.(N.S.) 1125, and authorities collated in note at page 1129. See also *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002.

41 N. D.—34.

**JOHN ENGSTROM, Appellant, v. HENRY NELSON and N. A. Nelson, Respondents.**

(171 N. W. 90.)

**Appeal and error—action for damages for assault and battery—evidence.**

1. In an action of assault and battery, it is not prejudicial error to refuse testimony that the witness has been convicted of a criminal charge in a criminal action where it is not shown to the court or it does not appear that the purpose of such testimony is either to affect the credibility of the witness or to prove an admission against interest by a proof of a plea of guilty in a criminal action for the same assault and battery.

**Evidence against interest—former conviction.**

2. Evidence in such action that a witness has entered a plea of guilty and has been convicted for the same assault and battery in a criminal action is admissible only as an admission against interest.

**Witnesses—conviction of crime—impeachment.**

3. Evidence that a witness has been convicted of a crime is admissible in a civil action of assault and battery, only for the purpose of affecting his credibility.

Opinion filed February 7, 1919.

Appeal from District Court, Burke County, *Leighton, J.*

Civil action for assault and battery.

Affirmed.

*E. R. Sinkler* and *M. O. Eide*, for appellant.

A nonprofessional witness who has observed a sick or injured person may testify as to his opinion as to such person's physical condition. *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528; *Wright v. Ft. Howard*, 60 Wis. 119, 18 N. W. 750; *Smalley v. Appleton*, 70 Wis. 344; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138.

Where a cross-examiner seeks to impair the credibility of a witness by proof of collateral crimes he should be confined to specific acts. *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. Nyhus*, 19 N. D. 326; *People v. Elster* (Cal.)

3 Pac. 884; *Marx v. Hilsendegen*, 46 Mich. 336; *People v. Wolcott*, 51 Mich. 612; *Sullivan v. Newman*, 17 N. Y. Supp. 424; *Smith v. State*, 79 Ala. 21; *Bates v. State*, 61 Ark. 640, 30 S. W. 890; *State v. Kent*, 5 N. D. 516; 11 Wigmore, Ev. pp. 110, 557, ¶ 982; *People v. Warren* (Cal.) 66 Pac. 212; *Germinder v. Machinery M. I. Asso.* (Iowa) 94 N. W. 1108; *McKesson v. Sherman* (Wis.) 8 N. W. 200; 1 Greenl. Ev. 16th ed. 461; *Smith v. United States*, 161 U. S. 85; *People v. Derbert*, 138 Cal. 467.

Where it is sought to impair the credibility of a witness on cross-examination he may be asked whether or not he committed the act or whether he has been convicted of a crime, as it raises a legal presumption and makes it provable that a crime has been committed. *State v. Nyhus*, 19 N. D. 326; *State v. Kent*, 5 N. D. 516; *State v. Oien*, 26 N. D. 555; *Lang v. United States*, 66 C. C. A. 255; *People v. Conly*, 106 Mich. 424; *Coleman v. Southern R. R. Co.* 138 N. C. 351; *Schnase v. Goetz* (N. D.) 120 N. W. 553.

*McGee & Goss*, for respondents.

Any error of the court committed in instructions concerning exemplary damages in an action only for damages for an unjustified assault is rendered nonprejudicial by a verdict of a jury that no cause of action existed even for compulsory or actual damages. *Stockwell v. Brinton*, 26 N. D. 1, 142 N. W. 242.

An erroneous instruction on the theory of implied warranty of corn sold to plaintiff is harmless to the seller of the corn where the jury find an express warranty was given. 2 R. C. L. p. 259, ¶ 210.

An erroneous instruction with regard to punitive damages is harmless where it clearly appears that no punitive damages were allowed. *Lindsey v. Oregon Short Line R. Co.* 13 Idaho, 477, 12 L.R.A.(N.S.) 184, 90 Pac. 984.

The rule is that a case will not be reversed because of giving an instruction which states an erroneous proposition of law, or is inapplicable to the issues or otherwise improper, where it is evident that it did not bring about an improper verdict. 2 R. C. L. p. 256, ¶ 209.

BRONSON, J. The plaintiff sued the defendants for assault and battery. Upon trial in the district court of Burke county before a jury a verdict was returned for the defendants. From the judgment

rendered thereupon, the plaintiff appeals and specifies thirty-nine errors of law committed by the trial court during the course of the trial. Thirty-six of such specifications relate to rulings of the trial court upon the admission of evidence and to remarks to the trial court occurring during the trial. Three of such specifications concern instructions of the trial court to the jury. The cause of action arose over a pile of old scrap iron situated on land owned by one of the defendants. The plaintiff previously had owned such land and claimed the right to take such scrap iron. On June 27, 1917, the plaintiff came to such land with a team for the purpose of taking away such old scrap iron. As he was proceeding to load up some of such scrap iron, the defendant Henry Nelson came; later the other defendant; a row occurred and a fight started. The plaintiff, claiming injuries suffered as a result thereof, brought this action. For some time anterior there had existed bad blood between the parties. It appears that on a previous occasion the plaintiff had been arrested for an assault on one of the defendants. The record discloses that there was criminal prosecution against the defendants for this alleged assault. It is wholly unnecessary for this court to review *in extenso* the numerous assignments of errors claimed. We have examined the record throughout, and we are satisfied that the plaintiff was accorded a fair trial, and that no prejudicial error is shown upon the matters raised in the specifications of error. It is time that this near feud should end.

The only matter in the record that engages our serious attention is the ruling of the trial court upon the following questions propounded by the plaintiff to one of the defendants:

Q. Have you ever been convicted of a charge in a criminal action?

A. Before this?

Q. Before this civil case?

A. Before this civil case?

Q. No, before this civil case to-day?

The court sustained an objection made to these questions.

The plaintiff predicates prejudicial error upon this ruling, claiming that his purpose in so asking such question was twofold. First, concerning the credibility of the witness. Second, to lay a foundation that the defendant had pleaded guilty in the justice court to this offense of assault and battery and had paid a fine therefor. And the plaintiff

further claims that such proof would have entitled him to an instruction of nominal damage.

If the record clearly showed this to be the purpose of the plaintiff, it was prejudicial error to sustain such objection.

It is admissible in evidence to show that a witness has been convicted of a crime for the purpose of affecting his credibility. *State v. Kent* (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Chnase v. Goets*, 18 N. D. 594, 120 N. W. 553; *State v. Oien*, 26 N. D. 552, 145 N. W. 424. See *State v. Nyhus*, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; *State v. Hazlett*, 16 N. D. 426, 438, 113 N. W. 374.

Evidence also is admissible which shows the entry of a plea of guilty and a conviction of a witness for the same assault and battery in a criminal case, as an admission of the witness against his interest. *Satham v. Muffle*, 23 N. D. 63, 135 N. W. 797; 5 C. J. 685.

In this case, the plaintiff made no offer of proof to inform the court of the purpose for which he asked the questions involved. There is no offer made in the record to prove that the defendants, or either of them, did plead guilty to the same assault and battery in a criminal charge. Previous to the time these questions were asked by the plaintiff, the counsel for the plaintiff asked the plaintiff, while he was on the stand, the following question: "Q. Do you know whether or not Henry Nelson pleaded guilty in the justice court, or was convicted of assault and battery a short time ago in this particular case?" This question was objected to and thereupon withdrawn by the plaintiff.

The record discloses that some of the witnesses herein were interrogated and gave evidence concerning testimony that was given in the case of *State of North Dakota v. N. A. Nelson*, the trial of which occurred in the same court a short time previous to this action. When this former question to the plaintiff and this former evidence is considered in connection with the specific questions, upon which error is predicated, it is rather apparent that the manner in which the same was propounded served to elicit an answer as to whether or not the defendant N. A. Nelson had been convicted of the crime of the same assault and battery involved herein. The plaintiff had no right to establish in the record the proof of the conviction of the defendant questioned in a criminal case of the same assault and battery. The plaintiff had



the right to show that the defendant had been convicted of a crime for the purpose of affecting his credibility. He might show in evidence proof of the conviction of the defendant upon a criminal charge for this same alleged assault and battery when the foundation was first laid that the defendant had pleaded guilty,—all for the purpose of an admission against interest. Therefore, the trial court, guarding against reversible error prejudicial to the defendants, under the circumstances, might properly sustain the objection to the question propounded until the plaintiff either advised the court of the purpose for which such question was propounded or framed a succeeding question clearly calling for testimony clearly admissible.

Finding no prejudicial error in the rulings, remarks, or instructions of the trial court, the judgment of the District Court is accordingly affirmed.

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THE FARGO MERCANTILE COMPANY, a Corporation, Appellant, v. MARTIN E. JOHNSON and C. E. Hamilton, Respondents.

(171 N. W. 609.)

**Guaranty — contracts — interpretation.**

The contract of guaranty upon which the suit is founded is *held* not to be ambiguous and, according to its terms, to be applicable to an existing account for goods previously sold as well as to goods sold subsequent to its execution.

Opinion filed February 7, 1919.

Appeal from the District Court of Cass County, *Cole, J.*  
Reversed.

*Engerud, Divet, Holt, & Frame*, for appellant.

If the terms of a promise are in any respect ambiguous or uncertain it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. Comp. Laws 1913, §§ 5900, 5914; *Rindge v. Judson*, 24 N. Y. 64; *Smith v. Malison*, 148 N. Y. 241; *Scott v. Wyatt*, 24 Ala. 489; *Tootle v. Elge-*

setter (Neb.) 15 N. W. 228; Locke v. McVean, 33 Mich. 472; Drummond v. Prestman, 12 Wheat. 515; Bridgeport v. Iowa, etc. (Iowa) 107 N. W. 937.

If the terms of a written contract are uncertain or ambiguous, parol evidence of all the facts and circumstances connected with the making of the contract should be admitted. Comp. Laws 1913, § 5907; Hazelton v. Fargo, etc. Co. 4 N. D. 376; Belloni v. Freeborn, 63 N. Y. 383; Bank v. Myles, 73 N. Y. 338; Hoffman v. Maynard, 93 Fed. 177.

*Lyman Miller*, for respondents.

A preamble of a statute is a clause introductory to and explanatory of the reasons of passing the act. 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19, 23; Luzerne County, 167 Pa. 632, 31 Atl. 862, 155 Ind. 374, 58 N. E. 496.

When used in a contract for the sale of chattels, "sold" does not necessarily imply a change of title. Whether the contract changed the title to the goods, or only agreed to sell and deliver it thereafter, depends on the whole language used in the contract. Gallupp v. Sterling, 22 Misc. 672, 49 N. Y. Supp. 945 (citing Anderson v. Read, 106 N. Y. 351, 13 N. E. 292; Blackwood v. Cutting Packing Co. 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 251; Brooks v. Libby, 89 Me. 151, 36 Atl. 66; Pittsburgh, C. C. & St. L. R. Co. v. Knox, 177 Ind. 344, 98 N. E. 295; Russell v. Nicoll, 3 Wend. 119, 20 Am. Dec. 670.

Where the words in the operative part of a written instrument are of doubtful meaning the recitals preceding the doubtful part may be used as a text to discover the intention of the parties and fix the meaning of the words. 2 Elliott, Contr. 1315; McCormick Harvesting Mach. Co. v. Laster, 70 Ill. App. 425; Chicago & C. R. Co. v. Aurora, 99 Ill. 205; American Surety Co. v. Halliwell Co. 9 Kan. App. 8, 57 Pac. 237.

BIRDZELL, J. Plaintiff appeals from a judgment in its favor, which was entered in the district court of Cass county, for the sum of \$463.95. The action was predicated upon the following contract of guaranty:

Whereas, Everybody's Store of Fargo, North Dakota, desires to

purchase goods, wares, and merchandise on credit of the Fargo Mercantile Company of Fargo, North Dakota,

Now, therefore, in consideration of such sales on credit by the Fargo Mercantile Company, we do hereby promise, agree, and undertake that said Everybody's Store shall pay for all goods, wares, and merchandise sold and to be sold as aforesaid; whether said indebtedness is in the form of notes, bills, or open account; and we do hereby waive notice of acceptance, sales, and deliveries and accounts of credit given as aforesaid and extensions of time of payment. It is understood and agreed that this is an open and continuing guaranty to the amount hereinafter named, and shall continue in force notwithstanding any change in the form of such indebtedness or renewals or extensions granted. And in consideration of such sales and deliveries, we do hereby guarantee payment of all claims above mentioned to the amount of fifteen hundred (\$1,500) dollars.

Martin E. Johnson  
C. E. Hamilton.

Witness: C. H. Lavell,

Dated at Fargo, N. D., Sept. 14, 1914.

The plaintiff claimed that, under the above contract, it was entitled to the sum of \$1,329 and interest, which represents the balance due it upon the account of Everybody's Store. It appears that, at the date of the execution of the foregoing guaranty contract, Everybody's Store was owing to the plaintiff on account for goods \$1,233.36. Subsequent to the execution of the guaranty, additional credit was extended, amounting to several hundred dollars. Everybody's Store became involved and went into bankruptcy. In ruling upon the testimony offered during the trial, the court held that the guaranty contract related only to goods sold after its date, and that it could not be construed as affording additional security for the balance due at the time of its execution. This ruling presents the only question that is involved upon this appeal.

It is our opinion that the guaranty contract is one in which the defendants undertook to secure to the plaintiff the account of Everybody's Store up to the amount of \$1,500, regardless of the date or time that the goods entering into the account were sold. It is a continuing guar-

anty calculated to induce the recipient to extend the limited line of credit to the one whose account is guaranteed, or, if credit had already been extended for a portion of the amount, of inducing the recipient to refrain from taking means of collection to the possible detriment of the principal debtor. Under the express language of the contract, the agreement is to pay for all goods, wares, and merchandise "*sold and to be sold as aforesaid.*" Effect cannot be given to this language without holding the contract applicable to merchandise sold prior to its execution. It seems to us that the contract is unambiguous, and from this it follows as a consequence that the court erred in sustaining objections to the introduction of the plaintiff's books of account going to show the state of the account of the principal debtor on September 14, 1914.

It is unnecessary to consider the other assignments of error. The judgment is reversed and the cause remanded for a new trial.

ROBINSON and GRACE, JJ., dissent.

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CARL MUELLER, Plaintiff and Respondent, v. PAUL BOHN, Sr.,  
et al., Defendants, and STONE-ORDEAN-WELLS COMPANY,  
a Corporation, Defendant and Appellant.

(171 N. W. 255.)

**Recording of instruments — purpose of statutes requiring registration — effect on party in possession of actual or constructive notice — good faith.**

The purpose of the registration statute is merely to give subsequent purchasers and creditors a ready means of seeing the records of prior conveyances. When a person is in possession under a conveyance, or where a party has actual or constructive notice of the same, then the recording statute does not apply. Good faith means good faith; it means an honest intention to abstain from taking an unconscientious advantage of another, even through the forms and technicalities of the law.

Opinion filed February 7, 1919.

Appeal from a judgment of the District Court of Hettinger County,  
Honorable *W. C. Crawford*, Judge.

Affirmed.

*Jacobson & Murray*, for plaintiff and respondent.

"If there was any defect in description on record the fact that description referred to the plot would cure it, because when an instrument refers to a plot that plot becomes a part of the description." *Boise City v. Hon.* (Idaho) 94 Pac. 167; *McCullough v. Olds* (Cal.) 41 Pac. 420; *Peoria Gas & E. Co. v. Dunbar* (Ill.) 85 N. E. 229; *Park Comrs. v. Taylor* (Iowa) 108 N. W. 927; *Neumeister v. Goddard* (Wis.) 103 N. W. 241; *Zuleger v. Zeh* (Wis.) 150 N. W. 406; *Pittsburg, C. C. & St. L. R. Co. v. Beck* (Ind.) 53 N. E. 439.

"Instruments affecting real estate the description of the property in which was more erroneous and more vague than the mortgage in question, have been uniformly held good by the courts even as against innocent purchasers." *Leonard v. Osborn* (Cal.) 146 Pac. 530; *Rogers v. McCartney* (Cal.) 84 Pac. 215; 22 Cyc. 1086, 1093; *Ford v. Ford* (S. D.) 124 N. W. 1108; *Smith v. Johnson* (S. D.) 138 N. W. 21; *Chadron Loan & Bldg. Asso. v. Hamilton* (Neb.) 63 N. W. 808; *Wetzler v. Nichols* (Wash.) 101 Pac. 867; *Loomis v. Chicago & N. W. R. Co.* (S. D.) 141 N. W. 386; *Bitney v. Grimm* (Or.) 144 Pac. 490; *Flegel v. Dowling* (Or.) 102 Pac. 178; *Reeder v. Reeder* (Or.) 135 Pac. 176; *House v. Jackson*, 32 Pac. 1027; *McMillan v. Batten*, 96 Pac. 673; *Tuthill v. Katz* (Mich.) 128 N. W. 757; *Sylvester v. State*, 91 Pac. 15; *Hall v. Bartlett* (Cal.) 112 Pac. 176.

"If the defendant has actual knowledge, as in this case of property covered by mortgages, he is not a good-faith creditor." *Illvedsen v. First State Bank of Bowbells*, 24 N. D. 227; *Gress v. Evans*, 1 Dak. 371, 36 L.R.A.(N.S.) 1124.

"In this kind of action it is incumbent upon the defendant to not only allege, but to prove, the facts constituting his lien." *Erum v. Weaver* (S. D.) 83 N. W. 579; 32 Cyc. 1369, Comp. Laws 1913, §§ 7691, 8153; *Locke v. Hubbard* (S. D.) 69 N. W. 588; *Cummings v. Duncan*, 22 N. D. 534; 23 Cyc. 1353.

*Thomas H. Pugh* and *Otto Thress*, for defendant and appellant.

"The burden of proving any kind of notice to appellant is upon the

plaintiff, who makes the allegation of notice." 21 Am. & Eng. Enc. Law, 589.

"Every conveyance not recorded shall be void as against subsequent purchase in good faith." N. D. Comp. Laws, § 5594; *Enderlin v. Hordhagen*, 18 N. D. 517, 123 N. W. 390; *Ildvedsen v. First State Bank*, 24 N. D. 227, 139 N. W. 105; *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78; 19 R. C. L. 288; Note in 137 Am. St. Rep. 254; see 19 R. C. L. 289; *Herman v. Deming*, 44 Conn. 124.

"If the description of the instrument is so defective and inaccurate that the subject of the grant is not properly indicated, the legal title will not pass, and it will not be constructive notice to a subsequent purchaser." *Roberts v. Grace*, 16 Minn. 134, Gil. 115; *Simmons v. Fuller*, 17 Minn. 485, Gil. 462; *LeNeve v. LeNeve*, 2 Lead. Cas. in Eq. 127, 179; *Bailey v. Galpin* (Minn.) 41 N. W. 1054; *Frost v. Beekman*, 1 Johns. Ch. 288; *Thorpe v. Helmar* (Ill.) 113 N. E. 954; *Merchants & Laborers Bldg. Asso. v. Scanlan* (Ind.) 42 N. E. 1008; *Bernhardt v. Reifers* (Ind.) 64 N. E. 459; 27 Cyc. 1209; 18 Am. & Eng. Enc. Pl. & Pr. 793; 34 Cyc. 924, ¶¶ 2, 940, 941, 953, 954; 24 Am. & Eng. Enc. Law, 655; 15 R. C. L. 814, §§ 280-282; *Williams v. Hamilton* (Iowa) 65 Am. St. Rep. 475, note p. 503; *Femberg v. Stearns* (Idaho) 131 Am. St. Rep. 119; *Western Chemical Co. (Colo.)* 107 Pac. 1081; *Bank of Ada v. Gulikson* (Minn.) 66 N. W. 131.

ROBINSON, J. This is a statutory action to determine an adverse claim to land. In such an action the complaint is a mere challenge to defendant to set forth and establish his adverse claim, or to abandon it. Defendant becomes practically the plaintiff and takes the affirmative in pleading and proof. *Steinwand v. Brown*, 38 N. D. 607, 166 N. W. 129. The complaint in this case merely avers that the plaintiff owns block forty-three in the village of Mott, and in Brown's second addition to Mott, and that the defendant claims some title or interest in the same adverse to the plaintiff. The answer, which is the real complaint, avers: That some time in the year 1911, the defendant Paul Bohn became the owner of the premises described in the complaint and was the owner thereof until May 1, 1917; that on August 13, 1914, this defendant recovered judgment against said defendant, Paul Bohn, Sr., for the sum of \$1,796.20, and judgment was there-

after, on August 20, 1914, docketed in the office of the clerk of the district court of Hettinger county, and that the same is a valid lien against the premises.

The reply, or answer, expressly denies that the judgment and lien mentioned in the answer is superior to the rights and claims of this plaintiff, and alleges that it constitutes only a cloud upon the title. However, that is an admission of the judgment and the docket.

As the record shows, in October, 1910, William Brown, the owner of block forty-three, conveyed the same to Paul Bohn, Sr. Then, in December, 1911, Paul Bohn conveyed the same by mortgage deed to one Trousdale to secure \$2,600 and interest. Trousdale assigned the mortgage to the First National Bank of Mott. It assigned the same to Carl Mueller, who foreclosed and obtained a sheriff's deed to the block. On February 1, 1914, the senior Bohn conveyed the block to a junior Bohn, and it appears the conveyance was made in good faith and for a valuable consideration, and the grantee at once took and retained possession of the block. Subsequently, on August 14, 1914, the appellant recovered and docketed the judgment as alleged. The claim of appellant is that its judgment is a prior lien, because that in the mortgage and in the deed made by Paul Bohn, Sr., the block was not sufficiently described. However, in each of said conveyances the description was block 43, in the village of Mott, as the same is laid down and described in the plat of said village, on file in the office of the register of deeds of Hettinger county; and as the trial court found, in the village of Mott there is only one block 43, and it is in the village of Mott and in Brown's second addition to the village; and at the time of docketing the judgment appellant had actual notice of the mortgage. At the time of filing the mortgage the village was new and small, and there was no possibility of mistaking the description. All the conveyances affecting block 43 were properly entered in the tract index. The credit man of appellant went to block 43, on which Bohn kept a livery stable and an implement house, and there requested Bohn to give him security on the block. However, he testifies that he had no knowledge of the mortgage or of the platting of the village of Mott. Still, he must have known where to find the plat, and it was not for him to shut his eyes and say that he did not see. By statute a register of deeds must keep a numerical index of deeds and mortgages. Sec-

tion 3332. He must keep a grantor and grantee index. Section 3334. In the numerical index under block 43 of Mott, the register of deeds made entry of all deeds and mortgages affecting that block. By looking at the index of grantors and grantees and the numerical index, a person would discover in a minute the mortgage in question, and that there was only one block 43 in the village of Mott, and in Brown's second addition; that said block 43 had been conveyed to Paul Bohn, and that he had given the mortgage and had parted with title before the docketing of the judgment.

The purpose of the registration statute is merely to give subsequent purchasers and creditors a ready means of seeing the record of prior conveyances. But actual notice of a conveyance or possession by the grantee has the same effect as the recording of the conveyance. A person cannot be a good-faith purchaser or encumbrancer of land against a party who is in actual possession, or when he has notice of facts or circumstances sufficient to put him upon inquiry. Good faith means good faith; it means an honest intention to abstain from taking an unconscientious advantage of another, even through the forms and technicalities of the law.

Judgment affirmed.

GRACE and BRONSON, JJ., concur in the result.

CHRISTIANSON, Ch. J. (concurring specially). I concur in an affirmation of the judgment. I am inclined to agree with Mr. Justice ROBINSON that under the facts in this case the description was sufficient. But in any event there was evidence tending to show, and the trial court expressly found, that the judgment creditor at all times had actual knowledge of the existence of the mortgage upon the premises. This would of course render the lien of the judgment subordinate to the lien of the mortgage.



**HARRY GIDLEY, Appellant, v. GEORGE H. GLASS, Respondent.**

(171 N. W. 93.)

**Statute of Frauds — collateral promise.**

In an action brought to charge the defendant for goods delivered to a third person, where the plaintiff testified that the defendant told him that he would see that he, the plaintiff, got his pay, the goods being charged to the third person to whom they were delivered, the evidence examined, and

*Held*, to establish a promise to pay for the debt, default, or miscarriage of another within the Statute of Frauds.

Appeal from a judgment of the District Court of Renville County, Leighton, J.

Affirmed.

*E. R. Sinkler, J. E. Bryans, and M. O. Eide*, for appellant.

"The party making motion for judgment notwithstanding the verdict must base it upon a state of facts that will warrant the court in granting it without trespassing upon the juries' province to be judges of all the facts in the case." *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110; *Nelson v. Grondahl*, 12 N. D. 130; *Meehan v. Great Northern R. Co.* 13 N. D. 432; *Houghton Implement Co. v. Vavrowski*, 15 N. D. 308.

"Where a substantial conflict exists, and there is sufficient testimony, if true, to justify the verdict, the court will not set it aside." *Leistikow v. Zuelsdorf*, 18 N. D. 511.

"The promise of one party to pay another party for goods delivered by such second party to a third party is an original promise, and not within the Statute of Frauds. Parting with the goods furnished the consideration to support the promise." *Grand Forks Lumber Co. v. Tourtelot*, 7 N. D. 587.

"To ascertain whether undertaking to pay debt of another be col-

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NOTE.—Authorities discussing the question whether a promise to pay the debt of another created contemporaneously with the promise is within the Statute of Frauds are collated in notes in 15 L.R.A.(N.S.) 214, and 32 L.R.A.(N.S.) 598, on contemporaneous promise of one person to pay where benefit inures to another as a promise to answer for the default of another within the Statute of Frauds.

lateral or original, the point of inquiry is, to whom was the credit given at the time of the sale and delivery of the goods?" *Larson v. Janson* (Mich.) 19 N. W. 130; *Keeler v. Cheadle* (Okla.) 72 Pac. 367; *Harris v. Frank*, 22 Pac. 858.

*Henry G. Middaugh, Rollo F. Hunt, and Albert E. Coger*, for respondent.

"The agreement and correspondence between the parties is pertinent, it should be controlling." *Hart v. Ten Eyck*, 2 Johns, Ch. 82.

"A promise upon which the statute declares no action can be maintained cannot be made effectual merely because it has been acted upon by the person to whom the promise was made, and not performed by the promisor." *Brightman v. Hicks*, 108 Mass. 246; *Grand Forks Lumber Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901; note in 15 L.R.A. (N.S.) 214 to 227; *Wood v. Dodge*, 23 S. D. 95, 120 N. W. 774.

"Will see you paid," is a collateral promise." *England-Matson v. Wharam*, 2 T. R. 80. See also *Peckham v. Faris*, 3 Dougl. 13; *Wagner v. Hallack*, 3 Colo. 183; *Jenkins, etc. Co. v. Lundgreen*, 85 Ill. App. 494; *Thwaites v. Curl*, 6 B. Mon. 472; *Blake v. Perlin*, 22 Me. 395; *Doyle v. White*, 26 Me. 341; *Cropper v. Pittman*, 13 Md. 190; *Meyer v. Grafflin*, 31 Md. 350; *Hill v. Raymond*, 3 Allen, 540; *Stone v. Walke*, 13 Gray, 613; *Nelson v. Boynton*, 3 Met. 400; *Cahill v. Bigelow*, 18 Pick. 369; *Swigart v. Gentert*, 63 Neb. 157; *Birchell v. Neaster*, 36 Ohio St. 331; *Nugent v. Wolfe*, 111 Pa. 481; *Skinner v. Conant*, 2 Vt. 453; *Blodgett v. Lowell*, 33 Vt. 174.

"5. 'Will pay if he does not.' Collateral." *Jones v. Cooper*, 1 Cowp. 227; *Warner v. Willoughby*, 60 Conn. 468; *Baldwin v. Biers*, 73 Ga. 740; *Reggie v. Smith*, 87 Ill. App. 141; *Schotte v. Puscheck*, 79 Ill. App. 31; *Conolly v. Kettlewell*, 1 Gill, 260; *Nelson v. Boynton*, 3 Metc. 400; *Grant v. Wolf*, 34 Minn. 32; *Dufolt v. Gorman*, 1 Minn. 301; *Allen v. Scarff*, 1 Hilt, 209; *Rawlinson v. Springsteen*, 2 Thomp. & C. 416; *Newcomb v. Clark*, 1 Den. 226; *Knox v. Nutt*, 1 Daly, 213; *Garrett-Williams Co. v. Hamill*, 131 N. C. 57; *Loftus v. Ivy*, 14 Tex. Civ. App. 701; *Steele v. Towner*, 28 Vt. 771; *Aldrich v. Jewel*, 12 Vt. 125.

"6. 'Will guarantee,' etc. Collateral." *Kinloch v. Brown*, 2 Speers, L. (S. C.) 284; *Butters, Salt, etc., Co. v. Vogel*, 130 Mich. 33; *Walker v. Richards*, 41 N. H. 388; *Norris v. Graham*, 33 Md. 56; *Dovenmuehle v. Milenberger*, 70 Ill. App. 180.

BIRDZELL, J. This action was brought to recover for goods alleged to have been sold to the defendant and upon his credit, but delivered to one Averil at defendant's request. The action was tried in the district court of Renville county and a verdict rendered for the plaintiff. Upon a motion for a judgment *non obstante*, the verdict was set aside and the plaintiff appeals.

The theory upon which defendant's motion was allowed was that the evidence showed that if any promise was made by the defendant to pay for the goods delivered to Averil, it resulted in an obligation collateral to that of Averil, and as such was a promise to pay for the debt, default, or miscarriage of another, within the meaning of the Statute of Frauds. Comp. Laws 1913, §§ 5888 and 6655.

The question presented is one of the sufficiency of the evidence to establish an original undertaking by the defendant. A careful examination of the facts is essential to a proper determination of the case. The plaintiff was engaged in the farm implement business at Glenburn. The defendant owned several quarter sections of land in that vicinity, which he rented to tenants. After renting some of his land to Averil on shares, the latter came to Glenburn for the purpose of beginning his tenancy, and arranged with the plaintiff to obtain certain machinery on credit. At the time he represented that the defendant Glass would stand good for the machinery, and it seems the plaintiff charged some items to the tenant and Glass jointly. (The plaintiff makes no claim for the recovery of these items in this action.) Later, however, the defendant came to Glenburn, and the alleged contract for the sale, as testified to by the plaintiff, was made.

The only evidence upon which the plaintiff's judgment can rest consists of his own testimony, his correspondence, and his book accounts.

The plaintiff testified concerning the transactions as follows:

Q. And Mr. Averil came and got prices from you, told you what he wanted and you had agreed to let him have the stuff?

A. With Mr. Glass going good for it, which Mr. Averil gave me to understand in the first place that he would.

Q. Averil told you that Glass would go good for it?

A. Yes, sir.

Q. Only these first two items were delivered before you saw Glass?

A. Yes, sir.

Q. The first item of \$133.50, the second for \$196.00, making a total of \$329.50, was credit you extended to Averil before you had any talk with Glass at all?

A. Yes, sir.

Q. Now, goods to that amount were actually delivered to Mr. Averil before this talk with Glass, were they not?

A. Yes, sir.

[The items above referred to are not involved in this suit, but the testimony is reproduced for its bearing upon the understanding with respect to the items here involved.]

I first saw Mr. Glass on or about March 2d.

Q. And it was at that time that Mr. Glass told you to let Averil have anything he wanted? Did he use those words?

A. He told me to *sell him the goods and he would see that I got my pay for it—for them.*

Q. (Referring to a note and mortgage Gidley took from Averil.) I mean didn't you tell Glass that Averil said Glass would sign those papers?

A. Averil told me that Glass was going good for them—for all this stuff.

Q. What did you tell him?

A. Mr. Averil told me that Glass was going good for all these goods, and when I asked Mr. Glass, he said, "All right."

Q. Did he object to signing a note and mortgage?

A. Yes, because if I asked him to he didn't sign it.

Q. Didn't you ask him to sign a note and mortgage, and didn't he tell you he wouldn't sign a note and mortgage, and wasn't that the first conversation you had with him?

A. Yes, I think he did.

Q. Now, you took another mortgage the next year from Mr. Averil, didn't you?

A. I think so.

Q. You never thought of asking him to sign that, did you?

A. Why, I took him at his word. *He told me that he would see that I got my pay and I took him at his word.*

Q. Did you send Mr. Glass any statements?

A. I don't think so after these letters I wrote him.

Q. Were those letters the only communications that you had by mail with Mr. Glass.

A. I think they were.

[The following testimony relates to some paper given by Averil for McCormick machinery which was turned over to the International Harvester Company by Gidley.]

Q. Did you tell the McCormick people when you turned that paper over to them that Mr. Glass was a guarantor on it?

A. I don't think I did.

Q. You are certain you didn't, aren't you, Mr. Gidley?

A. That certain paper, that separate paper, that was commission paper. *That stuff I understood I was to have a guaranty on was my personal stuff.*

[The record shows that Glass had ordered some harness for Averil to use, but on account of its not arriving in time other harness had to be purchased, and that when the harness to be supplied by Glass arrived it was turned over to Gidley. The following testimony tends to show what the understanding was regarding credit for the harness, and it also reflects Gidley's understanding as to the nature of Glass's alleged obligation.]

Q. And Mr. Glass brought this harness up to you and told you that he had intended it for Averil's use, but didn't come in time and wanted you to take it over?

A. I think that was it.

Q. Now, was that at the same time you had this talk where you say he told you he would see you were paid?

A. The time he turned the harness over to me?

Q. Yes.

A. It was along about that time. I don't know whether it was the same time or not, but he says I have got this harness and I will turn them over to you.

Q. Go ahead?

A. *And if Mr. Averil don't pay you, you will have that much on the deal.*

Q Didn't he say, "I will turn this harness over to you, and when Averil pays you you can pay me?"

A. Yes, sir.

Q. That is what he said?

A. Yes, when Averil paid me I could pay him.

In the plaintiff's ledger Glass is credited with the value of the harness, amounting to \$231, and the following memorandum appears in connection with the credit: "*To be paid when Averil has paid me in full.*"

The plaintiff testified further: "When I couldn't collect my money, that was my understanding, *I was to take those harness, and if Mr. Averil didn't pay me then those harness was to apply on the debt.*"

It seems that in 1912 the plaintiff and defendant entered into a mutual agreement whereby the defendant agreed to relinquish his prior crop mortgage upon Averil's share of the crop to enable the plaintiff to obtain a prior lien thereon for the book account.

In a letter written by the plaintiff on March 18, 1912, he said: "Am writing you regarding our deal with Mr. Averil. He has not paid me any money out of the 1911 crop, and, as you know, he didn't pay me any in 1910. I feel that I am entitled to some cash, for you have been in business and know that a man must collect some money or he cannot continue to do business. Of course *I know it is good for you have guaranteed the payments.* But I need some money, and think I am entitled to some from this deal. When I asked Mr. Averil for money this winter he said he hadn't hauled his grain yet and wouldn't freeze himself hauling grain for any man, and acted as though he thought I didn't have no business to talk to him about money."

Again on March 29, 1912, plaintiff wrote as follows: "You told me that you would see that I got my pay for the goods. You said you may have to carry part of it, but you would see that I got my money. *This surely is a guaranty.* I have carried this for two years and *he has never paid me a dollar.*"

The foregoing evidence establishes beyond doubt that in the transactions between the plaintiff and Averil the plaintiff regarded Averil as the principal debtor and looked to the defendant merely as a guarantor. While the plaintiff, during the latter part of his testimony, stated that

he didn't look to Averil at all and didn't regard him as being indebted to him, nevertheless, when his whole testimony is considered, in the light of the transactions and the book entries, it cannot be doubted that he did regard Averil as indebted to him for the full amount of the account. We are of the opinion that the plaintiff's own testimony shows a promise within the Statute of Frauds.

The appellant relies upon the case of *Leistikow v. Zuelsdorf*, 18 N. D. 511, 122 N. W. 340. This case does not support the appellant's contention. There was abundant testimony in the *Leistikow* Case to the effect that the plaintiff did not know *Rolczynzinski*, to whom the goods were delivered, and that he would not charge the goods to him, also such goods were ultimately charged to *Rolczynzinski* at the request of *Zuelsdorf*, the defendant. There is much testimony going to show that the goods in that case were bought by the defendant himself and were charged to *Rolczynzinski* at the request of the defendant as a matter of convenience between the defendant and *Rolczynzinski*. There is no evidence of any such understanding in this case.

The judgment appealed from is affirmed, with costs.

GRACE, J., disqualified, CRAWFORD, District Judge, sat in his stead.

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**GERMAN-AMERICAN STATE BANK OF BALFOUR, NORTH  
DAKOTA, a Corporation, Respondent, v. JOHN ERICKSON,  
Appellant.**

(170 N. W. 854.)

**Trial — variance between pleading and proof — evidence — rulings of trial court — prejudicial error.**

1. Where, during the trial of a case, the trial court announced a theory of the issues at variance with the issues as framed by the pleadings, and rulings were made upon the admission of testimony in accordance with such theory, a purpose having been evinced to conduct the trial according to the erroneous theory of the issues, it is held that, under the circumstances, such rulings constitute prejudicial error entitling the party adversely affected to a new trial.

**Trial — exceptions to ruling of trial court.**

2. Where a party adversely affected by rulings of the trial court excepts to the rulings, and abandons the trial, and is not required by the trial court to continue, he does not waive the errors.

Opinion filed January 11, 1919. Rehearing denied February 10, 1919.

Appeal from District Court of Pierce County, *Burr, J.*  
Reversed.

*Campbell & Jongewaard*, for appellant.

It was prejudicial error for the court to rule out as immaterial a question on cross-examination which tended to prove that a third party, and not the mortgagor, owned the horses when the mortgage was given. *Bidgood v. Monarch*, 9 N. D. 627; *Hawk v. Konouzke*, 10 N. D. 39; *Thurston v. Osborne*, 13 N. D. 512; *James v. Wilson*, 8 N. D. 186.

We were not first raising this ownership in third person on appeal. *Pitts v. Young*, 62 N. W. 432.

It is common learning in the law that a man cannot grant or charge that which he hath not. *Titusville v. New York*, 207 N. Y. 203; 11 C. J. p. 428; *Pitts v. Young*, 62 N. W. 432; *Plano v. Daley*, 6 N. D. 330; *Russel v. Amundson*, 4 N. D. 112.

*Albert Weber*, for respondent.

The sufficiency of the evidence to sustain a judgment given in a trial court to a jury cannot be renewed where no motion for a new trial was made in the court below. *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310; *F. A. Patrick & Co. v. Nunnberg*, 21 N. D. 377.

It was an error of judgment on the part of defendant's attorney to withdraw from the trial, and the defendant is bound by it. *Bacon v. Mitchell*, 14 N. D. 454, 4 L.R.A.(N.S.) 244; *Juneau County v. Hooker*, 67 Wis. 322, 30 N. W. 357; *Morris v. Soo R. Co.* 32 N. D. 366; *Steen v. Neva*, 37 N. D. 40.

**BIRDZELL, J.** This is an appeal from a judgment entered in the district court of Pierce county. The action is one for the recovery of specific personal property, upon which the plaintiff held a chattel mortgage, or for the value thereof, with damages for the detention. In the complaint it is alleged that the plaintiff is entitled to immediate possession of two mares under the terms of a chattel mortgage owned by



it, which was executed and delivered by one Christian Arveson, the owner of the property in question; that the plaintiff has demanded of the defendant the possession of the property, and that defendant has refused to deliver the same. The answer is in form a general denial qualified by some admissions that are immaterial upon this appeal. In addition, the answer contains a counterclaim in which the defendant claims damages by reason of the seizure by the plaintiff of one of the mares named in the mortgage, which the defendant alleged belonged to him *at the time of the commencement of the action*. It appears from testimony adduced upon the trial, that the mares in question were mortgaged to the plaintiff by one Christian Arveson, having previously been bought from the defendant, Erickson, and that both had been turned back to Erickson by reason of the nonpayment of the price. This gave rise to the present suit. Owing to certain rulings made upon the trial, which will be later examined, the defendant's counsel announced that he would no longer participate in the proceedings; whereupon, after the plaintiff had made certain formal proof, the court directed a verdict in its favor for \$350.

The rulings adverse to the defendant which led to his withdrawal from the trial were made during the cross-examination of the plaintiff's witness, Christian Arveson, the mortgagor of the property in question. The witness had testified in his direct examination that *he* had bought the horses, and on cross-examination he said that his wife took him over to Erickson's place, as she had the horse. It seems that Arveson and his wife took one of the mares home on that trip, and, at a later time, Mrs. Arveson took the other one home. A crisis was reached when defendant's counsel asked Arveson: "Now, as a matter of fact, your wife went over and bargained for those horses, didn't she?" The question was objected to as being immaterial, and the objection was sustained.

Immediately after this ruling the following colloquy took place between the defendant's attorney and the court:

Mr. Campbell: If that is immaterial, why—as to whether he owned these horses or his wife owned these horses—then we are out of court.

The Court: You don't set that up. If you wanted to prove she was the owner you should have set that up as a separate affirmative defense.

You set up the question of your own ownership; that you are the owner of the horses.

Mr. Campbell: Well, your Honor, there isn't any question.

The Court: I don't know whether there is or not; that is to be proven. Go on now with this case; that is all we want. If they had a mortgage on these horses they would be entitled to it.

Mr. Campbell: I don't want to argue with the court; but there is only one point in this case for us. We sold these horses to Mrs. Arveson; that this man didn't own them at any time; that his mortgage is no mortgage upon her property, and that she turned them back to us, and, therefore, we are the owners at the time of the commencement of this action.

The Court: Why didn't you set that up?

Mr. Campbell: My view is that the denial raises the question of who owns them.

The Court: They allege Christian Arveson was the owner, if you want to show he was not and Mrs. Arveson was; you have sold to her and she turned them back, why didn't you set that up?

Mr. Campbell: We might as well.

The Court: You want to try the case according to the issues that are in the pleadings, that is all we can go by.

Mr. Campbell: Let the record show—

The Court: You can dictate it if you wish.

Mr. Campbell: The defendant, at this time, offers to prove and informs the court that the defense to this action upon which he relies, and which he contends is raised by the pleadings under his denial, is that the mortgagor, C. Arveson, under whose mortgage plaintiff is claiming, is not and never was the owner of the horses; that at the time of the commencement of this action this defendant was the owner of the horse; because that he had sold them to one Hulda Arveson, the wife of C. Arveson, to whom he had sold and delivered them; and that they were not sold to the mortgagor, C. Arveson, and that Hulda Arveson had returned them in settlement of the purchase price to him; which return was made subsequent to the giving of the alleged mortgage to the German-American Bank.

The Court: I won't pass on that part of it, you are entitled to prove

that you are the owner of the property; you have alleged that you are, you are entitled to prove that.

Mr. Campbell: Our only basis of ownership is upon the state of facts as outlined.

The Court: What about that offer of proof?

Mr. Weber: We object to the offer of proof as not being within the issues raised.

The Court: Is that the only issue you are intending to raise?

Mr. Campbell: That is the only issue outside, well, of course, I have practically gone over that. I didn't know about the amount of that debt or any of that kind, the giving of the mortgage. We didn't know anything about it and it is so pleaded.

The Court: The only issue you are raising now is that you want to prove that you are the original owners, and that you had sold them to Hulda Arveson, and that some time after Christian Arveson had given the mortgage to the plaintiff, the mortgage that is in dispute, you claim that you made a settlement with Mrs. Arveson and that she returned the horses to you?

Mr. Campbell: Yes, and that he was never the owner of the property.

The Court: And you kept the note, you never returned the note? You have produced the note, exhibit 8 here, didn't you?

Mr. Campbell: That the note was left in the bank and that after this action was commenced was returned for the purpose of reference to this defendant. We will show, if that is material, about the keeping of the note.

The Court: What about it?

Mr. Weber: Plaintiff resists the offer of proof on the ground that it is not within the issues raised by the pleadings.

The Court: Do you want to amend your pleadings?

Mr. Campbell: No, I take the stand our pleadings raise the issue.

The Court: You don't want to amend? We will allow you an amendment to amend the pleadings to act upon whatever you claim is your defense, so that the matter can be properly tried.

Mr. Campbell: We take the position that the pleadings do not need amendment and will rest on our pleadings.

The Court: All right, I will sustain the objection to the offer of proof so far as the examination of this witness is concerned.

Mr. Campbell: In view of the fact of that being the sole defense upon the pleadings, we will, in view of the attitude and ruling, we will take no further participation in the proceedings.

Under the pleadings in this case the allegation that Christian Arveson was the owner of the property mortgaged was made by the plaintiff, and it was a material fact to be established upon the trial unless it were admitted by the defendant. The defendant nowhere in the answer admitted the ownership of the property to have been in Christian Arveson at any time. On the contrary, this allegation was met with a general denial. It is true that, in the defendant's counterclaim, it was alleged that *at the time of the commencement of the action the defendant was the owner of the property in question*, but this is not in any sense equivalent to an admission that at any time prior thereto Christian Arveson had been the owner. As the issues were explained in the course of the foregoing colloquy, it is clear that it would have been competent for the defendant to establish that Christian Arveson had been the owner of the marcs in question. Inasmuch, however, as the trial court, in finally ruling upon the materiality of the evidence in question, limited the ruling so that it would apply only to the examination of the witness then upon the stand, the question before us is whether or not, in view of all of the circumstances, the trial court erred in thus limiting the cross-examination. We are of the opinion that the ruling excepted to, under the circumstances, constitutes reversible error. It is apparent that the court would not have made the ruling except upon the theory that the issue of ownership presented was not properly raised by the pleadings. That the court still persisted in the erroneous theory of the issues in the case further appears from a continuation of the colloquy by way of explanation of its ruling, which was made after the plaintiff's attorney had been directed to proceed with his proof. The court said: "The court doesn't intimate of course, by such ruling as that, that the defendant is prevented from setting forth the defense set forth in ¶ 3 of his *counterclaim*, or the other defenses of his *counterclaim*." In the view we take of the pleadings, the defendant had a right not only to cross-examine fully upon the question of ownership, but also to establish affirmatively the plaintiff's

and the mortgagor's lack of title under the general denial, regardless of the counterclaim, and the pleadings require no amendment whatever to entitle the defendant to cross-examine fully or to introduce affirmative proof. The witness Arveson having testified affirmatively that he purchased the horses from Erickson, it is our opinion, in view of the vital character of his testimony as bearing upon the issue raised by the defendant, that a broad range of cross-examination touching the transaction, as a result of which Arveson claimed to be the owner, should have been permitted. Of course, it is not intended to hold that a suitor or his attorney may freely abandon the trial of an action whenever, in their judgment, an erroneous ruling has been made, but we are of the opinion that when, as in the case at bar, the trial court has announced an erroneous theory of the issues in a case and has evinced a purpose to compel a trial according to such erroneous theory, it is not incumbent upon a suitor to further participate in the proceedings unless directed so to do by the trial judge. On the contrary, when it appears that the continuation of the trial will serve no purpose except to accentuate an erroneous theory, the prejudice of the ruling is sufficiently demonstrated to warrant another trial.

Since there must be another trial of this case, it is deemed appropriate to note another error in the judgment. The record discloses that at the time the action was begun the plaintiff attempted to regain from Erickson the possession of both mares, and that the sheriff was only able to find one of them, the other, presumably, being no longer in the possession of the defendant. The one he found was left with the defendant under an arrangement which was satisfactory to the sheriff. This mare, then, may properly be considered as in the legal custody of the sheriff acting at the instance of the plaintiff. Section 7635, Compiled Laws of 1913, provides that in case a jury finds a verdict against the defendant and the property has been delivered to the plaintiff, they must find that the plaintiff is entitled to the property, and they must also assess his damages if claimed in the complaint. Under this section, as to the mare which was seized by the sheriff, the jury would only be warranted in finding that the plaintiff was entitled to possession and the damages the defendant must pay for detention. But the judgment is in the alternative for the return of the property or its value. This is erroneous. Even if the property be considered as not in the possession

of the plaintiff, then, under the same section, paragraph 1, the jury should have been instructed to find "the plaintiff's interest therein, since the plaintiff was only a mortgagee, and not the owner of the property."

The foregoing observations concerning the form of the judgment may or may not touch the merits of the case, depending upon the evidence that may be adduced upon a retrial going to establish the plaintiff's interest under its mortgage; also dependent upon whether or not the judgment is so entered that the defendant will obtain credit upon the money judgment for the value of the property already in the possession of the plaintiff.

There can be no doubt of the plaintiff's right to maintain the action in the form in which it is brought. The mortgage running to it gives it the right to take possession in case any attempt should be made to "dispose of such property." A similar provision in a chattel mortgage was construed by this court in the case of *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44, and it was held that upon the disposition of property thus mortgaged the right of the mortgagee to take possession arose instantaneously, and that a mortgagee purchasing mortgaged property is chargeable with the record notice of the stipulation referred to.

The case is remanded for a new trial.

CHRISTIANSON, Ch. J. (dissenting). I am unable to agree with either the conclusion or the reasoning of the majority opinion.

The plaintiff brought this action to recover the possession of two certain horses upon which it held a chattel mortgage. The defendant in his answer admitted that there appeared of record in the register of deed's office a chattel mortgage as set forth in the complaint, and denied the other allegations of the answer. As "a further defense and counterclaim," the defendant averred that he was the owner of one certain mare, which had been taken from his possession by the sheriff, under the claim and delivery proceeding instituted by the plaintiff ancillary to this action. The answer prayed judgment for a dismissal of plaintiff's action, and for the return of the mare in question or the value thereof, and for damages of detention.

The mortgagor, Christian Arveson, was called as a witness in behalf of the plaintiff. He testified that he was the owner of the horses

described in the mortgage, and that they were at his farm in McHenry county at the time the mortgage was executed. When asked, "Where did you get those animals," he answered, "I bought them from Mr. Erickson." He also testified that he gave his note to Mr. Erickson for the purchase price and paid him some cash which was to be indorsed on the note. (During the course of the trial the defendant in this action, on plaintiff's demand, produced the note, and it was offered in evidence and is part of the evidence in this case.)

On cross-examination Arveson was asked, among others, the following questions:

Q. You didn't have anything to do with Mr. Erickson in the buying of these horses?

A. Yes, sir.

Q. Did you see him?

A. I went there to see him and looked the horses over and bought them.

Q. You, yourself, went there, did you?

A. Yes, sir, my wife, took me over there, she had the horse.

Q. Now, who was it talked with Mr. Erickson about buying these horses, you or your wife?

A. Well, *I went there and talked with him and looked at the horses and bought them.*

Q. You did? Isn't it a matter of fact that your wife went with you to look at these horses and to buy them?

A. To look at the horses?

Q. Yes.

A. No.

Q. Didn't you tell me out there in the lobby that your wife had told you he had a nice team over there, that she could buy, just yesterday or the day before?

A. I don't remember telling you anything like that.

Q. Now is your memory— You have a good memory on these things, have you?

A. I was asked about that, but *I didn't say that.*

\* . . . . .

Q. How much were you to pay for the team?

A. Well, whatever the note amounted to and then the cash deducted.

. . . . .

Q. Who went over to get the horses?

A. Well, I was there and told Mr. Erickson that I thought my wife could probably lead one behind the buggy, home.

Q. Who went to get the horses, your or your wife?

A. I went as much as anybody, and I sent her over afterwards after the other one.

Q. Do you remember Mr. Morrow and Mr. Erickson being out at your place at the time you turned the horses back?

A. At the time I turned them back?

Q. Yes.

A. I don't remember of ever turning them back.

Shortly thereafter, and during the course of the same cross-examination, defendant's counsel asked Arveson the following question: "Now, as a matter of fact, your wife went over there and bargained for these horses, didn't she?" Upon an objection to this question being sustained, and following a certain colloquy between the trial judge and defendant's counsel, defendant withdrew from the case, and refused to take any further part in the trial. The proceedings immediately following the above question are set forth in the majority opinion, and it would be useless duplication to set the same forth at length in this opinion.

As stated in the majority opinion, the trial court, after the conclusion of the colloquy, specifically informed defendant's attorney that the ruling made was not intended as any intimation "that the defendant is prevented from setting forth the defense set forth in paragraph 3 of his counterclaim or the other defenses of his counterclaim."

The record also shows that a little later the following further colloquy took place:

The Court: The defendant withdraws then?

Mr. Campbell: We withdraw from any further participation, as shown on the record.



While there are authorities tending to support the views of the trial court that title in a third person must be specially pleaded in order to be available as a defense in an action to recover possession of personal property (*Dyson v. Ream*, 9 Iowa, 51; *Patterson v. Clark*, 20 Iowa, 429; *Tell v. Beyer*, 38 N. Y. 161; *Weaver v. Barden*, 49 N. Y. 286), I do not believe this to be the correct rule. Under a general denial the defendant should be permitted to introduce any evidence which directly tends to controvert the allegations of the complaint. But it by no means follows that a judgment should be reversed because the trial court made some erroneous ruling either with respect to the pleadings or the examination of witnesses, or both. Appellate courts "do not sit to decide moot questions, but to redress real grievances." *McGregor v. Great Northern R. Co.* 31 N. D. 471, 489, 154 N. W. 261, Ann. Cas. 1917E, 141. And the question presented to an appellate court is not whether the theories of the trial court or its rulings were in all instances abstractly correct, but whether the complaining party has been prejudiced, and prevented from receiving a fair trial, by reason of the ruling or action complained of. As was said by the supreme court of Wisconsin in a well-reasoned decision: "Stability of determinations of trial courts is of inestimable importance, both to the parties and the public. Technical defects, however numerous, should not constitute a basis for efficient interference. They should not count at all in that regard. Doubts should be resolved in favor of stability. Errors, however clear, inexcusable, or numerous, should be regarded as inconsequential, unless, manifestly, had they not occurred the result to the complaining party might, within reasonable probabilities, have been substantially more favorable to him." *Samulski v. Menasha Paper Co.* 147 Wis. 285, 293, 133 N. W. 142; see also 4 C. J. 924.

The precise error assigned by the defendant, and upon which the reversal is based, in this case, is that defendant was denied an opportunity to cross-examine the witness, Arveson. The right of cross-examination is a valuable one, and a trial court may not unduly restrict, or arbitrarily limit, cross-examination to the prejudice of any party, but "the scope, extent, and methods used in cross-examination of witnesses is largely within the discretion of the trial court, and its rulings in relation thereto will not constitute a ground for reversal except in a clear case of abuse of discretion." 4 C. J. p. 823.

It is elementary that the appellant has the burden of showing error. And when error is predicated upon a denial of cross-examination "the record must disclose with reasonable certainty that the alleged error in excluding the evidence resulted in substantial injury to the complaining party." 4 C. J. pp. 76, 77, § 1864. It will be noticed that the witness Arveson had already specifically testified on cross-examination that he, and not his wife, had purchased the horses and paid for them by executing a note, and paying some money. The note was produced by the defendant, and is part of the evidence in this case. In view of the answers already given, it is highly improbable that the witness Arveson would have given any answer in response to the question under consideration which would have been favorable to the defendant in this case. It will also be noted that the court expressly restricted the ruling to the witness Arveson, and that he specifically stated that by the ruling he did not intend to prevent defendant from establishing the matters set forth in his defense and counterclaim.

It is true the trial judge intimated during the colloquy that he considered evidence tending to show that Mrs. Arveson was the owner of the horses to be inadmissible, unless such ownership was specially pleaded. This statement by the trial judge, however, was anticipatory. When it was made, defendant was not introducing evidence in support of his defense, but was cross-examining one of plaintiff's witnesses. It is elementary that a party may not as a matter of right introduce evidence "in support of his case or defense, during the cross-examination of his adversaries or his adversaries' witnesses." 38 Cyc. 1355. It will be noted that the trial court expressly limited the ruling to the witness Arveson, and stated that he did not intend to intimate that he would prevent defendant from introducing evidence in support of the defense or counterclaims set forth in the answer. It will be noted, further, that the trial court expressly offered to permit the answer to be amended so as to permit the defendant to introduce evidence in support of his proposed defense. This offer was without condition. This being so, it seems clear that, in any event, the ruling was merely harmless error. *Dyett v. Harney*, 53 Colo. 381, 127 Pac. 226. Defendant's counsel had already specifically outlined his proposed defense, and it is beyond my comprehension how or in what manner he could have

been prejudiced by conforming to the trial court's suggestion that the answer be amended.

It is contended that the statement by the trial court as to the need of amending the answer might have had a prejudicial effect upon the jury. This contention is so obviously without merit as to be worthy of no extended consideration. If the contention is sound, it would follow that when it becomes necessary to amend a pleading during the course of a trial, the jury should be discharged and a new jury impaneled to try the case upon the amended pleading.

As already stated the question presented to this court is whether the appellant has affirmatively established by the record that he was prevented from obtaining a fair trial by reason of the rulings complained of. Unless he has done so, the judgment should be affirmed. Can it be said upon the record in this case that the defendant was prevented from obtaining a full and fair trial by reason of the rulings of the trial court? Was it not the action of defendant's counsel, if anything, which prevented defendant from proceeding with the trial, presenting any defense he might have had, and obtaining a full and fair hearing on the merits? It seems to me that upon the record in this case both of these questions should be answered against the appellant. In this connection it should also be noted that errors which occur during the course of a trial are frequently cured or rendered harmless by subsequent happenings. In the case at bar, the alleged error could, and probably would, have been cured or rendered harmless by subsequent occurrences, if the defendant had not withdrawn from the case. The withdrawal was after the court had offered to permit the answer to be amended. The defendant reiterated his withdrawal after the court had stated, in effect, that defendant would be permitted to introduce evidence to show that he was the owner of the horses (and this of course would include evidence as to the source of the title),—under paragraph 3 of the answer. Of course, as already stated, the time had not yet arrived for defendant to introduce evidence in support of his affirmative defense and counterclaim. In fact the entire discussion with respect to the sufficiency of the answer was anticipatory of what might, or would, arise during the presentation of defendant's side of the case. But, of course, in this case there was no opportunity to cure the alleged error, or render it harmless. Nor was there any opportunity to ascer-

tain whether defendant did in fact have any evidence tending to show that he did in fact sell the horses to Mrs. Arveson and afterwards received them back from her. This was brought about by defendant's withdrawal from the case.

So far as I can find the instant case is anomalous in the annals of jurisprudence. At least no reported case has been cited by defendant's counsel, and none has been found by any of the members of this court presenting a similar situation.

An appellate court is entitled to have before it the entire record in order to determine whether the complaining party has been prejudiced. And I have grave doubts if a party, who by his own actions in effect prevents a trial from being completed, and a complete record from being presented, is in any position to assert error. If the holding of the majority in this case is sound, then in case the trial court unduly restricts the cross-examination of plaintiff's first witness, defendant may rest upon the technical error made, refuse to participate any further in the trial, and come to this court and obtain a reversal of the judgment,—the rendition of which he did nothing to prevent. He may prosecute an appeal and obtain such reversal, even though the trial court expressly offers to permit the cross-examination to continue, providing the defendant amends the answer in conformity with an offer of proof which defendant has already made orally in the court.

In my opinion the defendant has not shown by the record presented on this appeal that he was prevented from having a fair trial by reason of any ruling made by the trial court.

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ANNA BERNAUER, Respondent, v. McCAULL-WEBSTER ELEVATOR COMPANY, a Corporation, Appellant.

(171 N. W. 282.)

**Quieting title—resulting trust—burden of establishing resulting trust.**

1. In an action to determine adverse claims, where the plaintiff asserts a title as vendee, under a contract for a deed, and where the appellant under a general denial seeks to defeat the title of the plaintiff by reason of a resulting trust and a conveyance made to defraud creditors, it is incumbent upon the appel-

41 N. D.—36.

lant to establish such resulting trust or conveyance made to defraud creditors by clear, substantial, and satisfactory proof.

**Quieting title — contract for deed.**

2. *Held*, under the evidence, that the trial court properly quieted title in the plaintiff, as vendee, in a contract for a deed as against the claims of the appellant herein, asserting liens upon the premises involved made by a third party to whom the appellant asserted that the title in such contract for a deed inured by reason of a resulting trust, or by reason of the conveyance having been made to defraud creditors.

Opinion filed February 6, 1919. Rehearing denied February 24, 1919.

Action to determine adverse claims.

Appeal from judgment rendered for plaintiff in District Court, Hettinger County, *Crawford, J.*

Affirmed.

*Thomas H. Pugh* and *Otto Thress*, for appellant.

"When a transfer of real property is made to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person by or for whom such payment is made." *Comp. Laws 1913, § 5365*; See also 39 *Cyc.* 104, 124.

"Unless the plaintiff shows a legal title or equitable interest in the land, she is not entitled to judgment awarding her the land." *Watt v. Morrow* (S. D.) 103 N. W. 45; *Comp. Laws, § 8144*; *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245; *Hannah v. Chase*, 4 N. D. 351, 61 N. W. 18, 50 *Am. St. Rep.* 656; *Galbraith v. Paine*, 12 N. D. 164, 96 N. W. 258; *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77; *Conrad v. Adler*, 13 N. D. 199, 100 N. W. 722; *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728; 17 *Enc. Pl. & Pr.* 300.

"Plaintiff has no right to call on the defendant to establish his claim, lien, or encumbrance until she has established her own title." *Conrad v. Adler*, and *Hannah v. Chase*, *supra*.

"The general denial is sufficient to raise the issue both as to the plaintiff's title and her right to have it quieted as against defendant's claim. No question has been raised as to the sufficiency of the pleading." *Larson v. Christianson*, 14 N. D. 476, 106 N. W. 51; *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85; *Pennie v. Hildreth*, 81 *Cal.* 127, 22 *Pac.* 398; *Adams v. Crawford*, 116 *Cal.* 495, 48 *Pac.* 488; *United*

**Land Asso. v. Improv. Co.** 139 Cal. 374, 69 Pac. 1064, 72 Pac. 988; **Redd v. Murray**, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; **Wheeler v. Paper Mills**, 62 Minn. 429, 64 N. W. 920; **O'Leary v. Schoenfield**, 30 N. D. 374, 152 N. W. 679; 32 Cyc. 1359.

*Jacobson & Murray*, for respondent.

"The pleading of a lien is absolutely essential." **Frum v. Weaver** (S. D.) 83 N. W. 579; **Larson v. Christianson** (N. D.) 106 N. W. 51

**BRONSON, J.** This is an action brought to determine adverse claims under the statute, § 8144, Comp. Laws 1913.

On October 11, 1915, the Moreau Lumber Company, the owner in fee of the farm lands involved, gave a contract for a deed to the plaintiff and respondent herein. Thereafter on April 27, 1916, Nick Hoffman and wife made a mortgage on the lands involved herein to the appellant, the McCaull-Webster Elevator Company.

In this action, the appellant, in its answer, sets forth only a general denial. Upon the trial, another action, with said Moreau Lumber Company as plaintiff and Anna Bernauer, the respondent and appellant herein, and others as defendants, was consolidated with this action and tried together. The district court, pursuant to findings made, rendered a separate judgment in this action quieting title in the plaintiff as the equitable owner of the premises herein, and adjudging the mortgage as well as other liens in favor of such appellant by said Nick Hoffman to be invalid as against the title of the plaintiff.

At the trial it was stipulated that the Moreau Lumber Company was the owner of the premises involved, and that the lien of the appellant, if any, was subordinate to the rights of such Moreau Lumber Company. The appellant herein prosecutes this appeal, and demands a trial *de novo* in this court challenging the judgment of the trial court, upon grounds that the plaintiff has failed to establish in the record her title to the premises; that the contract for such deed was made to said plaintiff in trust for Nick Hoffman; and that, further, such contract is void, because made to defraud creditors. In this action appellant has not demanded that its rights and claims be determined. The sole issue presented, as involved herein, is the question, whether or not the plaintiff in this action has established her title as found by the trial court. The evidence in the record well establishes by the contract itself the

right and interest of the plaintiff thereunder, unless the record shows in accordance with the contentions of the appellant that a resulting trust arose, by reason of the fact that the consideration for the contract in question was paid by one Nick Hoffman, and the title taken in the name of the plaintiff (Comp. Laws 1913, § 5365), or that such contract was so made to defraud creditors (Comp. Laws 1913, § 7220).

The evidence in the record is insufficient to establish clearly or by substantial proof, that the consideration was so paid by Nick Hoffman. On the contrary, there is some evidence in the record that part of the consideration at least was paid by the plaintiff. Likewise with respect to the contention of the appellant that the contract so made to the plaintiff was void, because made to defraud creditors under Comp. Laws 1913, § 7220, the evidence again is insufficient outside of the question of the appellant pleading any issue in that regard to establish any fraudulent intent.

We deem it unnecessary to discuss at length in this opinion, the evidence in that regard. We deem it sufficient to state that the findings of the trial court in this respect are correct.

As stated in *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 318, 83 N. W. 245: "We know of no rule of law which can be invoked to prevent a purchaser of real estate from directing the vendor to convey the title of the purchased property to another than the purchaser. This is a matter of frequent occurrence, and in such cases the deed will take effect and pass title according to the nature of the grant. Nor does the mere fact that the party who furnishes the consideration is in debt at the time, or that judgments have been docketed against him, operate in the law to defeat a title so conveyed. . . . True, the law sometimes conclusively presumes a fraudulent intent from a transaction which necessarily and inevitably operates to hinder, delay, or defraud creditors; but no such transaction is pleaded here. There is no allegation of any fraudulent intent, nor that Oliver C. Dalrymple was insolvent when this conveyance was made or at any time, and there is no such presumption arising from the facts pleaded."

Plaintiff in this action established *prima facie* a good and sufficient title as found by the trial court. No title, superior to that of the plaintiff shown by the necessary and satisfactory proof requisite, was

established by the defendant. The judgment of the trial court therefore is accordingly affirmed, with costs.

ROBINSON, J. (concurring specially). This appeal merits little consideration. In the printed brief of appellant all that is said of the pleading is that the complaint is in the statutory form of an action to quiet title, and the answer is a general denial. In such an action a general denial raises no issue; it amounts to nothing. The gist of the complaint is that the defendant claims some title or interest in said land adverse to the plaintiff. A general denial is a disclaimer. It is an averment that the defendant does not claim any title or interest in the land. The complaint is a mere challenge to defendant to set forth and establish an adverse claim or to abandon it. When a defendant answers and asserts a claim of title, he becomes practically the plaintiff. He takes the affirmative in pleading and proof. The plaintiff defends against the claim set forth in the answer. *Steinwand v. Brown*, 38 N. D. 607, 166 N. W. 129; *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424.

As it developed on the trial the claim of defendant was that on October 11, 1915, the Moreau Lumber Company held the legal title to the land in question and made a written contract to convey the same to the plaintiff as trustee for one Hoffman, her son-in-law, and that it was done to defraud the creditors of Hoffman. There was also a claim that Hoffman made payments on the contract. On April 27, 1916, Hoffman, now deceased, made to appellant a mortgage on the land to secure \$520 and interest. Now it seems the lumber company has obtained a foreclosure judgment on the contract for the balance of the purchase price, \$1,362.70, and interest, and appellant desires the court to adjudge that the land contract was taken in trust for Nick Hoffman, and that appellant be given the right to redeem the land in the same manner as if the title were in Nick Hoffman. But the court found, in effect, that Nick Hoffman did not make the payments, and that the land contract was not made in trust for him, and that he had no title or interest in the land. There is some evidence that Hoffman had farmed the land under a lease from the lumber company, and that payments were made from crops which he produced on the land, and that the Hoffman mortgage was given for lumber sold to improve the land. But under



the answer the testimony offered was all clearly inadmissible, and much of it was mere hearsay and not admissible under any form of pleading. Waiving objections to the answer, and considering the testimony, the case is not free from doubt. However, it is certain the written contract by the lumber company was to convey the land to the plaintiff, and it does not appear by clear and convincing evidence that the contract was made in her name as trustee for Hoffman, or that he made the payments. Indeed it does appear that the weight of testimony is to the contrary. In such a case to prove one a trustee by oral testimony, the pleadings should fairly present the issue, and the proof must be clear and convincing.

The judgment should be affirmed.

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JOSEPH BOXELL, Respondent, v. R. A. GRANT and H. F. Beeman, Copartners as Grant & Beeman Land Company, Appellants.

(171 N. W. 251.)

**Vendor and purchaser — covenant — measure of damages.**

In a written contract for the exchange of property where the defendants exchanged a quarter section of land at the agreed price of \$40 an acre with the plaintiff for his certain stock of merchandise, the balance of purchase price of land being settled for by taking plaintiff's promissory notes, and such written contract among other provisions contained the following clause: "We further agree within one year from date to find a buyer for said land at a price not less than \$40 per acre to said Joseph Boxell;" held that the same constituted a binding covenant on the part of the defendants to sell the land within one year. If the defendants failed to do so, they were liable in damages for the difference between the reasonable value of the land and \$40 per acre. After the expiration of the year, plaintiff sold the land for \$5,080, and the proof is sufficient to show that that was the reasonable value of the land at the time plaintiff sold it; that the measure of damages was the difference between that sum and \$40 per acre; that the above clause in the contract was relied upon by the plaintiff and to him constituted an inducement to make the contract. It was one of the principal elements of it, and was not, as claimed by defendant, a mere broker's agreement.

Opinion filed February 5, 1919. Rehearing denied February 24, 1919.

Appeal from the District Court of Hettinger County, North Dakota, Honorable W. C. Crawford, Judge.

Affirmed.

*Jacobson & Murray*, for appellants.

If the plaintiff could not recover against the defendants as vendees under this contract, then he cannot recover against them as brokers. See *McCulloch v. Bauer*, 24 N. D. 109.

"In an action by a vendor to recover damages for a breach of contract by the vendee, it is incumbent upon the former to establish by competent proof that, prior to the commencement of the action, he was ready, able, and willing to fully perform on his part, notwithstanding the fact that the vendee had informed the vendor of his inability to carry out the contract on his part." *McVeety v. Harvey Merc. Co.* 24 N. D. 245; *Ink v. Rohrig* (S. D.) 122 N. W. 594; *Godfrey v. Rosenthal* (S. D.) 97 N. W. 365.

In equity a good title means a marketable title, and such a title is necessary and sufficient. And according to the weight of authority the same is now true at law. 39 Cyc. 1452, 1454, 1458, 1460, 1465.

*M. S. Odle*, for respondent.

An order overruling a motion for judgment notwithstanding the verdict is nonappealable. *Stratton v. Rosenquist*, 37 N. D. 117.

The measure of damages for the breach of a contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. N. D. Comp. Laws 1913, § 7146; 8 R. C. L. § 22, p. 451; *Hallen v. Martin*, 167 N. W. 314; *Winston v. Wells-Whitehead*, 8 L.R.A.(N.S.) 255, and cases cited therein. See 4 R. C. L. p. 285, § 32.

GRACE, J. Appeal from the district court of Hettinger county from an order denying judgment notwithstanding the verdict or for a new trial and from the judgment, Honorable W. C. Crawford, Judge.

Grant & Beeman were, on the 4th day of August, 1913, residents of Mott, North Dakota, and were copartners engaged in the real estate business. The plaintiff also was at that time a resident of Mott and was the owner of a stock of groceries and some fixtures and furniture, and on the 4th day of August, 1913, the plaintiff and defendants en-

tered into a written contract for the exchange of the grocery stock and some of the fixtures, etc., for a certain tract of land located in Clay county, Minnesota. The following is the contract:

This agreement, made and entered into this 4th day of August, A. D. 1913, by and between Joseph Boxell, party of the first part, and the Grant & Beeman Land Company of Mott, North Dakota, party of the second part.

Witnesseth, that, whereas, the said Joseph Boxell agrees to make an exchange of his grocery stock, all furniture and fixtures now inside of the building, located on block 29 in the village of Mott, North Dakota, and used in the business, including all stocks, bakery outfit, horses, harness, buggy, delivery wagon, sleighs, and all counters and counter scales according to bill made out by the said Joseph Boxell and handed to J. B. Smith, including in addition to same the shelving on east partition, oil tanks, grocery counters, scales, and platform scales and ice cream outfit. In payment of the same the said Joseph Boxell agrees to take one quarter section of land located west of Ulen, Minnesota, in section five (5), which was inspected by the said Grant & Beeman Land Company at \$40 an acre, which land is to be conveyed to the said Joseph Boxell by a contract for deed. All deferred payments to be paid out at the rate of \$500 per year at six per cent (6%) interest. When the first instalment of \$500 is paid by the said Joseph Boxell, he shall be entitled to a deed to said land, and shall at that time execute a mortgage covering the deferred payments then remaining unpaid.

Said Joseph Boxell further agrees that the above-described property to be exchanged by him for said land will be conveyed free and clear of all encumbrance.

Said Grant & Beeman Land Company agrees to do all in their power to get the deal through between the parties as soon as possible. Said Grant & Beeman Land Company is to receive a commission of \$160 to be paid by the said Joseph Boxell as soon as the said Joseph Boxell sells the land at \$40 per acre or more. Said Grant & Beeman Land Company having the right to sell the land at above-named price unless withdrawn from the market by said Joseph Boxell and in such case and at such time as said Joseph Boxell should decide to withdraw it from the

market at \$40 an acre, the \$160 becomes due and payable. We further agree within one year from date to find a buyer for said land at a price at not less than \$40 per acre to said Joseph Boxell. In part of this agreement second parties are to lease said building for at least one year, at \$75 per month.

In witness whereof, we have hereunto set our hands and seals the day and year first above written.

[Seal] Mrs. Abbie Boxell,

[Seal] Joseph Boxell,

[Seal] Grant & Beeman Land Company,

By H. F. Beeman.

In presence of:

Paul Bohn, Sr.

P. S. The above Grant & Beeman agree to complete deal in case above land has not been sold by Higley since July 22, 1913.

The plaintiff pleads reliance upon the promises, representations, and agreements of the defendants in the contract and the delivery of the grocery stock to them at the agreed price of \$3,067, and the receiving in exchange the contract for deed to the N.E.  $\frac{1}{4}$  of section 5, township 141, range 45, Clay county, Minnesota, at the agreed price of \$40 per acre, and, in addition to turning over the stock and fixtures described in the contract, he executed promissory notes to Otto C. Neuman, the owner of the land at the time of sale, for \$3,333, and delivered the same to the defendants. The pleading shows that defendants received for their share of the transaction the stock of merchandise of the value as above set forth, and also a note for \$333 made to Otto C. Neuman, but indorsed by him to the defendants. Complaint shows that the plaintiff placed the land upon the market and requested the defendants to sell the same for him in accordance with the agreement; that plaintiff kept the land on the market for sale for more than a year immediately subsequent to the date of the purchase; that the defendants during that time had the right and opportunity to sell the land at \$40 per acre net to plaintiff, but have failed, neglected, and refused to do so at the price agreed upon in the contract or at any other price; that the plaintiff had not seen or inspected the land at the time of making the contract and relied upon the appraisal, judgment, and representations made to him in regard to the land by the defendants at the time of making the

contract; that the plaintiff, after receiving the contract for deed to the land, used his best efforts to sell and dispose of the same and realize upon his equity, and did all things possible to assist defendants to sell the land, and, after more than one year had elapsed from the date of the purchase of the land, plaintiff sold the land for the sum of \$5,080. He claims damages in the sum of \$1,320, the difference between the selling and the purchase price, and that no part of the same has been paid except \$779.08, which was realized by a judgment aided by attachment in Clay county, Minnesota. He alleges a balance due of \$540.92. The plaintiff further claimed damages for removal and sale by the defendants in violation of the contract of shelving on the west side of the storeroom in the sum of \$75. The plaintiff, in his complaint, set forth two other causes of action which were by the court stricken out upon motion for a directed verdict.

The answer is a general denial. It admits the execution of the contract and alleges full compliance therewith. It alleges defendants' readiness and willingness at all times to perform their part thereof. It alleges reasonable care and due diligence in carrying out the agency with the terms of the agreement, and alleges the defendants did find a purchaser who was ready, able, and willing to purchase the land from the plaintiff within the time specified in the contract, and that plaintiff refused to sell the land to the purchaser. They further allege violation of the terms of the agreement by the plaintiff and the failure by him to perform his part thereof; that he withdrew the land from the market. Defendants further, in their answer, state they procured for the plaintiff a lease of the building at \$75 per month for a year. Defendants plead a counterclaim of \$160 for commission for finding a purchaser for the land.

The action was tried to the court and a jury. The verdict of the jury was for \$453.20 in favor of the plaintiff and costs at \$43.65. The verdict is amply supported by the evidence and is conclusive on the court as to all questions of fact submitted to it.

The appellant sets forth several specifications of insufficiency of evidence to support the verdict. He also sets forth a number of facts claimed to be conclusively established by the testimony in his favor. We do not deem it necessary to set out all the specifications of the insufficiency of the evidence nor all the facts claimed to be proved in defend-

ants' behalf. They will be discussed under the more general classification selected by the appellant. The same is true of fourteen classifications of error made by appellant. The three main propositions relied upon by appellant are stated by him in his brief as follows:

"First, the defendants are not liable under their brokers' contract without a showing that they were negligent or did not use reasonable diligence or skill and industry to accomplish the object of their employment. There is no evidence of any negligence or lack of skill. Second, conceding that the defendants are liable, still the plaintiff has failed to prove any damages, among other things he has failed to show the reasonable value of the land at the time he sold it. Third, there is no evidence of any contract liability on the part of the defendants guaranteeing the plaintiff protection of the shelves upon which the third cause of action is based. There is no evidence that the defendants converted the shelves. No evidence of the reasonable value of the shelves at the time of the alleged taking."

With reference to the first proposition, the defendants claim they were under no liability under the contract because they maintain they did not agree to pay the plaintiff \$40 per acre within one year, but simply agreed to find a buyer who would pay not less than \$40 per acre within one year. They claim it was incumbent upon the plaintiff to show something more than a failure on the part of the defendants to find a buyer; that it was incumbent upon the plaintiff to show negligence and bad faith on the part of the defendants. We are wholly satisfied there is no merit in the contention. The appellant in his brief uses the following language: "Suppose the contract did not specify \$40 an acre, but just simply stated that they were to find a buyer within a year, could the plaintiff then hold the defendants for the reasonable value of the land?"

That is supposing something that is not in this case. A reference to the contract will disclose that the defendants agreed with the plaintiff to find a purchaser for the land within one year from the date of the contract, at a price not less than \$40 per acre. This is a part of the contract which, it can be readily understood, would have much influence upon the mind of Boxell in inducing him to enter into the contract. Boxell having not seen the land, and the contract itself disclosing that the land was inspected by Grant & Beeman Land Company at

\$40 per acre, and coupled with this, the positive agreement to which we have referred, justified plaintiff in concluding that the land was worth \$40 an acre, and he might reasonably conclude that the value of the land appearing to be \$40 an acre, it would be quite probable that the defendants would find a buyer for the land at a price at not less than \$40 an acre within a year. He had a right to assume, from all the foregoing, that the land at the date of the contract was worth \$40 an acre, and we think the testimony shows that that is what he paid for it through Grant & Beeman. The plaintiff relied upon the representations and agreements, and, while so relying thereon, parted with his own property and notes to the value of \$6,400 or \$40 an acre for the land. The defendants were required by the contract had during the year to find a buyer for the land at a price of not less than \$40 per acre to Joseph Boxell. They were in no way prevented from doing so by the plaintiff. Plaintiff himself had made reasonable effort to dispose of the land during the year following the making of the contract, and, after the expiration of the year, did so for the sum of \$5,080. From all that appears in this record, plaintiff seems to have acted in entirely good faith toward defendants and gave them every opportunity to make good under the agreement to sell the land within a year for \$40 per acre. Plaintiff also appears to have made a reasonable effort to sell the land for all that it would bring. There is no bad faith or fraud charged against him in the making of the sale, and we believe, from what is disclosed by the record, it was sold by Boxell for at least its market value, if not more. Especially is this true when we consider the letter from the defendants to Boxell of date of September 9, 1914, which clearly shows that the price of the land at the date of the contract was inflated. We quote so much of the letter as is material to this question:

"We have your letter of recent date in relation to the trade that you made with Mr. Neuman something over a year ago, and note that you would like to come back here again and run a store, providing we will start you up in business by furnishing you a stock of goods to go on. You state that the land you traded for is not worth \$40 an acre, and that it is not as represented. You can make that statement in a letter, if you choose, but you know well that the land is actually as recommended and that our part of the transaction was carried out to the letter. We admit the land will not sell for \$40 an acre cash, but it will

come nearer to cashing up at the figure traded for than the old stock of goods and fixtures will that you traded. We presume that you must have thought us all a bunch of chumps at the time we traded, to have taken your old stock in here at three times what it was worth and four times what we got out of it, and sell you land in exchange at a close cash figure. We had thought that you were possessed of enough ordinary intelligence to realize that if you inflated your goods on a trade that the other fellow must, of necessity, raise on his price, if he was not to lose out altogether. Now you were well pleased with the land when you looked it over with Mr. Higbie, and any person of good common sense will tell you that \$40 an acre for that land is not an unreasonable trade price. It would appear that you would have it, that you are the only fellow who is permitted to inflate values on a trade, which is customary the world over.

"We told you that we could sell your land for the price traded for, and we could have sold it on the crop payment plan, but you insisted that you would not sell it on those terms. We did not agree to sell it for cash as you insisted afterwards, and we cannot figure where you have any holler as far as we are concerned, as we have fulfilled our part of the program to the letter. If you think that you can get a piece of money out of us, why just go ahead and we will show you where you are mistaken."

The tone of this letter would seem to indicate that it would have been likely impossible for the plaintiff to have sold the land for any greater price than he did sell it. It also shows that it is not likely that the defendants could have sold the land for \$40 an acre during the year however much they may have tried. As we view the agreement, no terms being stated therein, the selling price would be presumed to be cash, and not crop payment or otherwise. Plaintiff's measure of damages, under these circumstances, was the difference between the price which the defendants agreed to sell the land for within the year and upon which agreement plaintiff relied, and the price for which the land actually was sold, *viz.*, \$5,080.

Plaintiff was not required to show bad faith or negligence on the part of the defendants. He had a right to rely upon his contract. If the defendants did not procure him a buyer for the land within the year as they had in writing agreed to do at the time they sold the land



to him at \$40 an acre, and receive pay therefor in the manner above stated, he could recover his damages, which would be measured by the difference between the approximate real value of the land and \$40 per acre. From all the testimony, facts, and circumstances in the case, \$5,080 would seem to be about the actual value of the land at the time plaintiff sold it. As we view the matter, the agreement in the contract by the defendants to sell the land within one year at \$40 per acre was not a broker's contract, though to a certain extent it may partake of the nature thereof, but surely it was one of the inducing causes which caused the plaintiff to enter into the entire transaction and was a covenant upon which plaintiff had a right to rely and did rely; and, by relying upon such covenant, he had a right to assume that he was certain some time during the year in question to receive \$40 per acre for the land; for the defendants, in making the deal, had agreed in writing they would find a purchaser for the land at that price. They did not in the contract say they would try to find a purchaser or would make their best efforts to find a purchaser, but contracted to find one. The agreement to find a buyer for the land within a year at \$40 an acre was a material part of the contract, which the plaintiff was entitled to have the defendants perform, or, in the event of the nonperformance which would constitute a breach of the contract, he had a legal right to a suit for damages by reason thereof, and the jury has fixed the damages and we think correctly.

It is also further claimed by the defendants that the plaintiff withdrew the land from sale during the year, and they also claim they offered during the year to purchase the land from Boxell at \$40 per acre upon terms stated by Grant in his testimony. All this is denied by Boxell in his testimony. Thus there is a conflict in the testimony and the question was one properly for the jury. Its verdict was in favor of the plaintiff and necessarily disposed of these questions of fact. The jury heard all the testimony with reference to the value of the land. Boxell testified that at the close of the year which Grant and Beeman had to sell the land, it was worth \$19 per acre. About six months after Boxell had entered into the contract, he went on the land, and his testimony is to the effect that the value of the land at that time was \$19 per acre. Beeman's testimony is that at the time of the contract, the land was well worth \$40 an acre. At the expiration of the year, he

said, "We figured we could get \$45 for it if we got hold of it." Grant's testimony is to the effect that the land increased in value after Boxell became the owner.

The following question was asked him:

Q. What would you say that land was worth now an acre?

A. About \$55 or \$60 an acre.

The jury heard all this testimony and evidently did not believe the testimony of Grant and Beeman. They apparently did believe Boxell's testimony and returned a verdict in his favor. The letter which we have quoted in full also throws some light on the value of the land at the time of the contract. We think the effect of the jury's verdict is to find that the land was sold for what it was reasonably worth at the time Boxell sold it.

There remains but a single question for our consideration, and that is with reference to the \$160 commission referred to in the contract to be paid to the defendants under certain conditions named in the contract. The court gave full instructions with regard to this item, all of which were entirely favorable to the defendants. The instruction, we believe, was erroneous, but of this defendants cannot complain, for it was altogether favorable to them. The plaintiff does not complain and is satisfied with the verdict as it stands. The trial court referred to this item very frequently in its instruction. The following may be taken as a summary of the instruction on this point: "Now, in any event, that particular item under this contract whether he withdrew it from sale or whether they sell it for him, the defendants are entitled to the sum of \$160, so, in any event, if you find in favor of the plaintiff upon that item, the defendants are entitled to a further sum of \$160, if they sell it or if it is withdrawn from the market, so it would be a net price of \$6,240, so that they would be entitled to a credit of \$160 upon that item. If you find in favor of the plaintiff upon the same as provided in this contract, and this contract is what is being sued upon and the terms of this are binding upon both parties."

That instruction is in square conflict with the conditions upon which the commission was to be earned as contained in the contract. The contract says, "Said Grant & Beeman Land Company is to receive a

commission of \$160, to be paid by the said Joseph Boxell *as soon as the said Joseph Boxell sells the land at \$40 per acre or more.*" No commission could accrue to the defendants, therefore, under this term of the contract until Boxell had sold the land for \$40 per acre or more. Another condition of the contract is that "said Grant & Beeman Land Company have a right to sell the land at above-named price unless withdrawn from the market by said Joseph Boxell, and in such case and at such time as said Joseph Boxell should desire *to withdraw it from the market at \$40 per acre, the \$160 becomes due and payable.*" Boxell did not withdraw the land. The jury must have so found, and no commission is earned under this condition of the contract. Then follows the condition wherein the defendants within the year from the date of the contract agreed to find a buyer for the land at a price at not less than \$40 per acre to said Joseph Boxell. It is clear that the defendants have not brought themselves within the terms of the contract whereby they would be entitled to the \$160 commission. However, as above stated, the plaintiff does not complain of the instruction in a manner so as to express a desire for a reversal of the judgment on that ground, but does, in his brief, assert that it is erroneous. He, however, is satisfied with the verdict, and, as before stated, defendants cannot complain.

The question with reference to the shelving was submitted to the jury. Plaintiff claimed that there had been moved therefrom by the defendants, in violation of the contract, the shelving of the west side of the storeroom. Testimony with reference to this matter, as well as the first cause of action, was submitted to the jury, and they have returned a verdict in favor of the plaintiff. We think there is ample evidence to sustain the verdict. We have examined the errors assigned by the appellant and all the instructions given by the court, and believe there is no reversible error of which the defendants can complain.

Judgment and orders appealed from are affirmed, with statutory costs.

BIRDZELL, J. I concur in the foregoing opinion in every respect, except that portion which relates to the instruction given by the trial court. I think the instruction was correct.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur in result.

S. J. AANDAHL, Chas. W. Bleick, and M. P. Johnson, as the Board of Railroad Commissioners of the State of North Dakota, Respondents, v. GREAT NORTHERN RAILWAY COMPANY, Appellant.

(171 N. W. 628.)

**Railroads — powers of Board of Railroad Commissioners — stations.**

1. The Board of Railroad Commissioners have no general or inherent powers authorizing them to require railroad companies to establish stations at places not possessing the requisites described in the statutes.

**Railroads — statutes — establishment of stations.**

2. Section 4656 of the Compiled Laws of 1913 does not authorize the establishment of a new station within 5 miles of another station established in this state.

**Railroads — stopping places — powers of Board of Railroad Commissioners.**

3. Where a railroad company establishes a stopping place for receiving and discharging passengers, the Railroad Commissioners have authority to require the construction and maintenance of a platform and building sufficient for the accommodation of such traffic.

**Railroads — evidence — stopping places.**

4. *Held*, by a majority of the court, that the evidence in the instant case is insufficient to show that a stopping place has been established and advertised by the railroad company.

Opinion filed January 11, 1919. Rehearing denied February 26, 1919.

Appeal from the District Court of McKenzie County, *Fisk, J.*  
Reversed.

Statement by BIRDZELL, J. This is an appeal from a judgment entered in the district court of McKenzie county, under which the defendant and appellant is compelled to construct and maintain a plat-

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NOTE.—That it is within the power of the Board of Railway Commissioners to compel the establishment of a railway station or the stoppage of trains where the needs of the public require it will be seen by an examination of notes in 17 L.R.A. (N.S.) 821; 29 L.R.A. (N.S.) 159; 44 L.R.A. (N.S.) 478, on power to compel establishment of stations, or the stopping of trains at stations.

41 N. D.—37.

form and station within the village of East Fairview, North Dakota, sufficient to care for such passengers as may take the train at that place. The proceedings were initiated by a petition signed by residents of the village of East Fairview and addressed to the Board of Railroad Commissioners, asking that the appellant railroad company be required to erect a depot and install an agent at such place. It appears that a hearing was held by the Board of Railroad Commissioners, at the conclusion of which an order was entered requiring the construction and maintenance of a platform and building for the convenience of passengers. From this order an appeal was perfected to the district court and a trial was subsequently had, resulting in the judgment above referred to.

The findings of fact made by the trial court are to the effect that the village of East Fairview is incorporated and contains a population of 285 persons and property of the assessed value of \$60,000; that there are located in such village various business enterprises, including two banks, three elevators, flour mill, stockyards, livery barn, garage, implement business, Standard Oil Company station, Jennison Milling Company plant, offices, and numerous other business institutions, and a Consolidated Public School; and further that the village is a trading point and shipping point for a large tributary agricultural country, most of which is within an irrigation project. That during the year preceding the order made by the Railroad Commissioners the freight receipts properly apportionable to the village exceeded the sum of \$32,000; that there are several tracks of the Great Northern Railway Company, consisting of the main line of the Snowdon-Fairview line and the main line from Fairview to Watford City, and various industrial tracks intersecting the village. That there is no depot, station, platform, or other stopping place in East Fairview, or tributary thereto, in North Dakota. That the railroad business in connection with the East Fairview vicinity is transacted at the station and depot at Fairview, Montana, the depot being located 3,370 feet south and west from the central part of East Fairview village. That the trains of the defendant company pass through the village of East Fairview without stopping except for switching purposes; that there is no station in North Dakota within approximately 5 miles of the village of East Fairview; that the village of East Fairview has been recognized by the defendant company in its rate schedules, passenger schedules, and other operations as

a point from which and to which freight could be consigned and delivered, and that public necessity requires the construction of the building and platform referred to. The foregoing constitutes a sufficient statement of the facts upon this appeal.

*Murphy & Toner, for appellant.*

At common law the legislatures and courts of equity had certain powers of regulations over railroads based either on charter provisions or the police power. *State v. R. Co.* 92 Pac. 606; *Chicago etc. v. Minnesota*, 134 U. S. 418.

Neither judicial power nor legislative power can be delegated to the Railroad Commission. *Louisville etc. v. R. R. Commissioners*, 19 Fed. 679; *R. R. Commissioners v. R. Co.* 27 Sup. Ct. Rep. 90; *N. P. R. Co. v. Washington*, 142 U. S. 492; *Atlantic etc. Co. v. Wilmington R. Co.* 111 N. C. 463; *R. Commissioners v. Oregon R. Co.* 19 Pac. 702; *State v. Atlantic etc. R. Co.* 40 So. 875; 2 Elliott, Railroads, § 682; *Re Pacific R. Commission*, 32 Fed. 241; *Eastern R. Co. v. Concord R. Co.* 47 N. H. 108; *State v. Chicago etc. (S. D.)* 94 N. W. 406.

The jurisdiction of a statutory tribunal such as the Commission will not be extended by implication. *Re Beckman Street*, 20 Johns. 269; *Thatcher v. Powell*, 6 Wheat. 119; *Kansas etc. R. o. v. Campbell*, 62 Mo. 585.

No authority existed at common law to compel a railroad to build stations or install agents. *N. P. R. Co. v. Washington*, 142 U. S. 492; *Atchison etc. R. Co. v. Denver etc. R. Co.* 110 U. S. 667; *People v. New York*, 104 N. Y. 58; *Southeastern R. Co. v. Commissioners, L. R.* 6 Q. B. Div. 586; *R. Commissioners v. Oregon*; *State v. Atlantic etc. R. Co. and State v. Chicago etc. supra*; *Nashville etc. v. State (Ala.)* 34 So. 491; *State v. Kansas etc. (La.)* 25 So. 126; *Atlantic etc. v. Wilmington etc.* 111 N. C. 463; *Chesapeake etc. v. Comm.* 54 S. E. 331.

There can be no delegation of power to railroad commissioners. Administrative duties essential for the execution of the law may be delegated. *Georgia etc. v. Smith*, 70 Ga. 694; *State v. Great Northern*, 111 N. W. 289; *State v. Young*, 9 N. W. 737; *State v. R. Co.* 37 N. W. 782; *Anderson v. Assurance Co.* 60 N. W. 1095, 63 N. W. 241; *State v. Copeland*, 69 N. W. 27; *State v. Johnson*, 60 Pac. 1068; *State v. Wagener*, 80 N. W. 778.

The order of the Commission is not a judgment, and the Commission is not a court. *Interstate Commerce Comm. v. Cincinnati*, 64 Fed. 98; *Telourney v. Jeffersonville*, 17 Ind. 169; *Wilkins v. State*, 113 Ind. 514; *Betts v. Dimon*, 3 Conn. 107; *Re Pacific R. Commission*, 32 Fed. 241; *State v. New Haven etc.* 43 Conn. 351; *Chicago etc. v. R. R. Comrs.* 38 Ind. App. 439; *People v. R. R. Comrs.* 158 N. Y. 421; *Mississippi R. R. Comm. v. R. Co.* 203 U. S. 235; *State v. Wilmington etc.* 122 N. C. 877; *State v. Wilson*, 121 N. C. 425.

The order of the Commission must be enforced, if at all, by the courts. *R. R. Comrs. v. R. Co.* 63 Me. 269; *R. R. Comrs. v. R. Co.* 71 S. C. 130; *Smith v. Chicago, etc.* 53 N. W. 128; *State v. Chicago etc.* 58 N. W. 1060; *State v. Mo. Pac.* 92 Pac. 606; *R. Co. v. State*, 137 Ala. 439, 34 So. 401; *State v. Yazoo*, 87 Miss. 679, 40 So. 263; *State v. Des Moines*, 54 N. W. 461; *State v. Chicago etc.* 53 N. W. 253.

The courts will not enforce an order that the Commission has not authority to make. *Oregon etc. v. Fairchild*, 224 U. S. 510; *State v. R. Co. (La.)* 25 So. 126; *Nashville etc. v. State (Ala.)* 34 So. 401; *State v. Tompkins*, 77 N. W. 104; *Comp. Laws* § 4743; *State v. R. R. Comrs.* 79 N. W. 510; *Northern Pacific v. Washington*, 142 U. S. 492.

In the absence of statute to that effect, the order of the Commission does not put the burden upon either party as to the prima facie validity of such order. *Oregon etc. v. Fairchild*, 224 U. S. 510; *State v. R. Co. (La.)* 25 So. 126; *Nashville etc. v. State (Ala.)* 34 So. 401; *State v. Tompkins*, 77 N. W. 104, *Comp. Laws*, § 4743; *State v. R. R. Comrs.* 79 N. W. 510; *Northern Pacific v. Washington*, 142 U. S. 492; *R. R. Comrs. v. R. Co.* 203 U. S. 335; *Atchison etc. v. Denver*, 110 U. S. 667; *Maele etc. v. People*, 132 Ill. 559, 24 N. E. 643; *Chicago etc. v. People*, 152 Ill. 230, 38 N. E. 562; *Louisiana v. State (Ark.)* 121 S. W. 284; *State etc. v. Chicago*, 94 N. W. 406; *Elliott, Railroads*, § 682; *State v. Des Moines*, 54 N. W. 461; *State v. Yazoo*, 87 Miss. 679, 40 So. 263; 23 Am. & Eng. Enc. Law, 655.

The Commission has no control over interstate traffic. *R. Co. v. Blackwell*, 244 U. S. 310; *R. R. Comrs. v. Illinois (U. S.)* 27 Sup. Ct. Rep. 90; *Chicago etc. v. State*, 238 U. S. 491; *Ry. Co. v. Illinois*, 163 U. S. 142; *Great Northern v. Commission*, 238 U. S. 340; *Stone v. Farmers Trust Co.* 116 U. S. 307; *Charleston v. Furniture Co.* 237

U. S. 597; Chicago etc. v. Minnesota, 134 U. S. 418; Mississippi R. Com. v. Illinois etc. 203 U. S. 335; Mobile etc. v. Sessions, 28 Fed. 592.

The order of the Commission is an interference with interstate traffic, and deprives appellant of property without due process of law. State v. Kaster, 168 Pac. 838; Chicago etc. Ry. Co. v. R. R. Comrs. 237 U. S. 226.

East Fairview does not come within the terms of § 4656, Comp. Laws 1913. Ricker v. Portland, 90 Me. 395, 38 Atl. 338; Gaycon v. R. Co. Grant, Ch. (U. C.) 62; Caldwell's Case, 19 Wall. 264; State v. R. Co. 18 L.R.A. 502; Southern etc. Co. v. N. A. Land Co. 50 Fed. 26.

*William Langer*, Attorney General, *Edw. B. Cox*, Assistant Attorney General, and *Wm. G. Owens*, State's Attorney, for respondents.

*Geo. F. Schafer and Palmer, Craven, & Burns*, for petitioners.

The findings and orders of the Railroad Commission are prima facie right and just and have been authorized by law. Comp. Laws 1913, § 4741; Mpls. St. Paul, etc. R. R. Co. v. R. R. Comm. (Wis.) 17 L.R.A.(N.S.) 821 and note, 116 N. W. 905; Louisiana R. R. Co. v. Railroad Commission, 121 La. 855, 46 So. 994; St. Louis R. R. Co. v. Bellamy (Ark.) L.R.A.1915D, 96. Also see note in L.R.A.1915D, 100, 101.

Even when the installing of a depot may be unprofitable, its installation may be lawfully required when public necessity demands it. Chicago R. I. R. R. Co. v. Nebraska Railroad Commission, 26 L.R.A. (N.S.) 444, 124 N. W. 472.

BIRDZELL, J. (after stating the facts as above). The question presented is one of the power of the Board of Railroad Commissioners to make the order which lies at the foundation of the judgment of the district court. The existence of this power is dependent upon the statutes which prescribe the powers and duties of the commissioners of railroads. It seems to be practically conceded that there is no statute which contains a specific authorization in express terms. Section 589, Compiled Laws of 1913, vests in the Railroad Commissioners general supervision over all railways, etc., and authorizes them to inquire into any neglect or violation of the laws of the state; also to carefully inspect "as provided by law" the condition of each railroad and its equipment, and the manner of its conduct and management,



with reference to public safety and convenience. Section 4713, Compiled Laws of 1913, recognizes the right of city, village, and township authorities to complain to the Board of Railroad Commissioners with reference to rates and the "condition or operation" of any railroad, and recognizes the right of the legal voters to petition the local authorities to make complaint and application to the board, in response to which the commissioners are authorized to adjudicate the matter and report to the governor. Section 4715 makes it the duty of railroads to furnish, start, and run cars for the transportation of persons and property, when offered for transportation "at any of its stations on its line of road, and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging passengers and freights; and requires that they "shall take, receive, transport, and discharge such passengers and property at, from, and to such stations, junctions, and places on and from all trains advertised to stop at the same for passengers and freight respectively. . . ." Section 4656 requires every railroad to "build and maintain a station house and keep a station agent twelve months each year when so ordered by the Railroad Commissioners at all of its sidings where there is grain and merchandise of any description to be shipped, when the outgoing and incoming freight, and all other receipts at said stations, amount to \$12,000 or more in any one year. Provided, that said stations are not less distant than 5 miles apart upon the same line of railway." The record in the instant case is in one respect quite peculiar. There is an abundance of testimony going to establish the freight receipts properly apportionable to the village of East Fairview and also testimony to the effect that the principal shippers of freight in East Fairview are given the advantage of intrastate rates in North Dakota upon such intrastate shipments as they make. For this purpose the place of origin of the freight is considered to be East Fairview, North Dakota, and not Fairview, Montana, where the billing is done. There is no testimony touching the passenger rates or the handling of passenger traffic at East Fairview, save the statement at various places in the record to the effect that passengers frequently get on and off the trains at East Fairview while they are stopped there for other purposes than receiving and discharging passengers in the regular way. Yet, neither the order of the Railroad Commissioners nor the judgment of the dis-

strict court attempts to compel the railroad company to provide any additional facilities for the handling of freight, the order and judgment being limited entirely to the duty to erect a platform and building for the accommodation of such passengers as might desire to get on and off trains at East Fairview. It is clear that the judgment is not founded upon § 4656; for, as before stated, it does not require any alteration in the existing method of handling the freight traffic at East Fairview. It is equally clear that, while § 4713 seems to recognize the municipal corporation as a unit in initiating investigations by the Board of Railroad Commissioners, this section deals primarily with rates and with the "condition and operation" of railroads affecting the complaining municipality. While it does not provide any specific remedy to be applied by the board, it is doubtless contemplated that the power to adjudicate the complaint shall carry with it the power to direct the employment of reasonable means to remedy the situation complained of, if the necessity is determined to exist. But, as we view this section, it would not authorize the Railroad Commissioners to establish stations where none were provided before, nor could the Commissioners, acting under this section alone, require the outlay by carriers of considerable sums of money in locating, building, and maintaining new stations. We are also of the opinion that § 589, which describes in broad language the powers and duties of the board, cannot be construed as authorizing orders requiring the establishment of new stations. Section 4715, however, specifically makes it the duty of every common carrier to furnish, start, and run cars for the transportation of persons offering themselves for transportation at any of its stations and at such stopping places as may be established for receiving and discharging passengers, and it requires that they shall take, receive, transport, and discharge, such passengers from and to such stations and places from all trains advertised to stop at the same for passengers.

Exhibit 1 in this case is a folder, such as is generally issued by railroad companies, containing the local time-tables upon the lines of the appellant company. Time-table No. 146 is a schedule of trains on the Snowdon-Fairview-Arnegard and Watford line. In this schedule East Fairview appears as a station at which two of the trains of the appellant, one going each way daily, except Sunday, are advertised to stop, there being five minutes difference in time between East Fairview

and Fairview, a distance of approximately half a mile. The time-table in this respect is the same as in the cases of Grand Forks and East Grand Forks, Fargo, and Moorhead, and Wahpeton and Breckenridge, at the eastern boundary of the state, where separate stations are maintained. This exhibit, in connection with the testimony going to establish a more or less well-defined custom of allowing passengers to get on and off trains that stop at East Fairview for other purposes, in the opinion of the writer, and of Mr. Justice Grace, constitutes a sufficient showing of the handling of passenger traffic at East Fairview to make that place a stopping place within § 4715, above quoted. But a majority of the court is of the opinion that the evidence is insufficient to show that any stopping place had been established by the railroad company or recognized by it, other than the regular station established at Fairview. It is conceded by all that this question of fact is, under the record, a close one, the majority being impressed particularly by the fact that there is no evidence that passenger tickets have been sold to and from East Fairview, and that those desiring to get on and off the trains at such point have merely availed themselves of the uncertain opportunity afforded by the stopping of trains there for other purposes. If the fact of the establishment of the stopping place were found to be in accordance with the view of the writer of this opinion, the propriety of the judgment directing the construction of a station house and platform for the accommodation of passengers would, of necessity, be tested in the light of the condition thus created by the company itself. The statutory duties, under § 4715, would follow as a matter of course. In view of the ample argument of counsel and of the public nature of the question, we feel warranted in saying that, under this construction, the following considerations would be controlling as to the powers of the Railroad Commissioners: It is one thing to require that a station be established at a point not previously recognized as a station and quite another matter to require the maintenance of suitable facilities for the accommodation of passenger traffic that has its beginning and ending at a definite place. Upon the supposition that the legislature has made it the duty of the railroad company to receive and discharge passengers at East Fairview, the action of the Board of Railroad Commissioners could not be regarded as going further than necessary to require reasonable accommodations for such traffic. While there is no

statute which, in specific terms, authorizes such an order, we are of the opinion that if the evidence warranted a finding of the existence of a stopping place at East Fairview there is ample authority for the railroad commissioners to make the order in question. Upon the supposition that a definite duty is imposed to supply cars and stop trains for the handling of passenger traffic, the obligations incident to the public calling of the appellant, in the light of the conditions under which its traffic must be handled, are not met unless there be provided such reasonable facilities as will enable the company to handle the traffic in a reasonably safe and convenient manner; and we are of the opinion that the judgment in question goes no further than this, and that it would be amply warranted by §§ 4713 and 4715 of the Compiled Laws of 1913.

There is even respectable authority for the proposition that the courts possess inherent power to require those engaged in public callings to respect the obligations incident thereto, even where the legislature has not imposed a positive duty and even where duties of similar character are imposed by a statute not applicable to the particular situation. See *People ex rel. Hunt v. Chicago & A. R. Co.* 130 Ill. 175, 22 N. E. 857. A somewhat similar principle was applied in *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Railroad Comrs. v. Portland & O. C. R. Co.* 63 Me. 369, 18 Am. Rep. 208; *State ex rel. Mattoon v. Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329, also reported upon rehearing in 18 Neb. 512, 26 N. W. 205; *Concord & M. R. Co. v. Boston & M. R. Co.* 67 N. H. 464, 41 Atl. 263; *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co.* 12 S. D. 305, 47 L.R.A. 569, 81 N. W. 503. But since our legislature has seen fit to enact legislation which seems to be quite comprehensive, embracing the major duties attaching to the operation of railroads in this state, we do not feel called upon to express our adherence to a doctrine as broad as was applied in some of the foregoing cases. The regulation of railroads is primarily a legislative function; and where the legislature has attempted to exercise its powers to the extent that it has in this state, we are of the opinion that it is only in exceptional cases a court would be warranted in exercising its inherent powers through mandamus. The fact, however, of the existence of such a power indicates the necessity of giving a reasonable construction to the regulatory

and supervisory statutes vesting general supervision in the administrative agencies created by the Constitution, to the end that specific duties attaching to the particular calling, and which are imposed by the legislature, shall be discharged in a reasonable manner, viewed from the standpoint of public safety and convenience.

We have examined the cases of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *People v. New York, L. E. & W. R. Co.* 58 Am. Rep. 484, 104 N. Y. 58, 9 N. E. 856; *Nashville, C. & St. L. R. Co. v. State*, 137 Ala. 439, 34 So. 401; and *State ex rel. Smart v. Kansas City, S. & G. R. Co.* 51 La. 200, 25 So. 126. While these authorities are not consistent with the holdings in *Connecticut*, *Maine*, *Nebraska*, *New Hampshire*, and *South Dakota*, in the cases hereinbefore referred to, they cannot be regarded as direct authorities, where the duty sought to be enforced is one which is fairly to be inferred from the statutes. These authorities point only to the necessity of there being legislative authority for such an order as the one in question.

According to the view of the majority of the court, no stopping place having been established at East Fairview, no duties devolve upon the railroad company to provide passenger facilities at that point, and there being no statute upon which the order and judgment can be based, the judgment appealed from must be reversed. It is so ordered.

BRONSON, J., being disqualified, did not participate, Honorable W. L. NUESSELE, Judge of Sixth Judicial District, sitting in his stead.

ROBINSON, J. This is an appeal from an order of the district court in accordance with an order of the Railroad Commissioners which is that the railway company must construct and maintain at East Fairview a platform and passenger depot. As appears, East Fairview is on the east side of the Montana line, and Fairview is just on the other side. The villages are separated only by the imaginary line. The distance from the center of one village to the center of the other is a quarter of a mile; from the center of East Fairview to the depot is about  $\frac{1}{2}$  of a mile, because the depot is well to the west of Fairview so as not to impede traffic and to give the trains a good starting place.

Now East Fairview is  $4\frac{1}{2}$  miles west from Cartwright and  $\frac{1}{4}$  of a mile east from the depot. It has a few business houses, a schoolhouse, but no postoffice. Its population is less than 300; that of Fairview is over 900. In time the two villages may become cities and be united as greater New York. The company shows that the cost of a platform and a depot would amount to \$3,000 and the cost of maintenance \$200 a month, and that a loss and detriment to the railway company and the public would result from the construction of a railway station and the stopping of trains at such short distances as a half mile or  $\frac{1}{4}$  of a mile.

There is nothing except the state line to obstruct the transit from one village to the other, or to prevent the two villages from becoming a greater New York. Yet, it is claimed that each village should be given the same railway facilities as St. Louis and East St. Louis, Kansas City and West Kansas City, Omaha and Council Bluffs, Fargo and Moorhead, Grand Forks and East Grand Forks, Bismarck and Mandan. Yet we should remember that even in these big cities many people have to go  $\frac{1}{4}$  of a mile to the railway depot, and many people do not like to have a railway station in the back alley or in very close proximity. Doubtless it was for that reason, as well as for the high ground, that the railway station was put  $\frac{1}{4}$  of a mile from the business center of those villages, and to give them a better chance to grow westward.

But, waiving the humor of the question and leaving jokes aside, it does seem quite funny and ridiculous for a little place with but two or three score families to insist on having a railway station and a depot built and maintained for their special accommodation when they have a good depot, at the most, within a half or  $\frac{1}{4}$  of a mile. Of course the order must be reversed.

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ISAAC LINDBERG and David Lindberg, Appellants, v. W. P. BURTON, Respondent.

(171 N. W. 616.)

**Usury — legal rate of interest — statutory provisions relating thereto.**

1. Under § 6976, Compiled Laws 1913, declaring that the charging of a rate

of interest greater than that allowed by the statutory provisions therein specified, when knowingly done, shall be deemed a forfeiture of the entire interest, and providing that, in case the greater rate has been paid, the person paying it may recover back in an action for that purpose twice the amount of interest thus paid from the person who has taken or received it, provided such action is commenced within two years from the time the usurious transaction occurred, a cause of action for the penalty arises only when interest has actually been paid.

**Usury — what constitutes — must be “paid.”**

2. The statute contemplates an actual payment, and not merely a further promise to pay. Interest is not “paid” within the meaning of the statute by the giving of a renewal note or notes.

**Usury — remedy for, purely statutory.**

3. The remedy provided by the statute is exclusive.

**Usury — recovery of penalty for — proof of payment.**

4. A party who seeks to recover the penalty prescribed by section 6076, *supra*, must bring himself within its provisions, and must allege and prove, among other things, that he has actually paid interest upon a usurious contract.

Opinion filed November 23, 1918. Rehearing denied February 27, 1919.

From a judgment of the District Court of Burke County, *Leighton, J.*, plaintiffs appeal.

Affirmed.

*E. R. Sinkler* and *M. O. Eide*, for appellants.

“The test of usury is: Will the contract if performed result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended?” *Rantalla v. Haish*, 156 N. W. 666.

Compound interest, or interest upon interest, constitutes usury when contracted for contemporaneously with the creation of the original debt. Note in 33 L.R.A.(N.S.) 296.

An agreement made before interest becomes due to compound it is void. *Gay v. Berkley*, 100 N. W. 930.

A contract included in a single instrument to pay interest on interest will not be enforced. *Lee v. Melby*, 100 N. W. 379.

*Palda & Aaker* and *John E. Greene*, for respondent.

“The taking of interest notes at semiannual periods does not amount to the compounding of interest. *Kellogg v. Hickok*, 1 Wend. 522;

Tyler v. Yates, 3 Barb. 222; Kennon v. Dickens, 1 N. C. (Conference), 357; Connecticut v. Jackson, 1 Johns. Ch. 14; Mowry v. Bishop, 5 Paige, 98; Myer v. Muskatine, 1 Wall. 384-391; Goodale v. Wallace, 19 S. D. 417; Tyler, Usury, pp. 240-244.

CHRISTIANSON, J. The plaintiffs brought this action to recover the penalty for usury provided by § 6076, Comp. Laws 1913. The complaint sets forth three causes of action. The first cause of action is for interest upon an alleged usurious contract, alleged to have been paid on November 18, 1912. The second cause of action is for interest alleged to have been paid on November 18, 1913. And the third cause of action is for interest alleged to have been paid on November 18, 1914.

The answer denies that the defendant at any time reserved, charged, or received any usurious interest. The answer sets forth at great length the business transactions between the plaintiffs and the defendant. According to the allegations of the answer such transactions commenced in the year 1908, and have continued since that time. Such transactions consisted of loans made to the defendant in 1908, advancements made for various purposes during the subsequent years, and the taking of renewal notes from time to time. The answer also avers that the defendant is a man of very limited education and unable to compute the amounts due upon the various notes; and that at two different times when such renewals were made, he engaged the services of two different attorneys, and that the computations were made by such attorneys. It is specifically averred that the defendant at no time had any intention of charging, reserving, or receiving any usury, and that any errors made made in the computations or any overcharges included in the notes were the result of mistakes of computation, and that such amounts were not included for the purpose of exacting usury. The answer specifically admits that errors were made in such computations, in this that the plaintiffs were not allowed credit for a \$75 payment, and that a note for \$525 held by the defendant as collateral to their indebtedness was included in a renewal note by mistake; and defendant offers a remission of these amounts, with interest computed thereon from the dates the mistakes were made, and avers that the plaintiffs have been credited with these respective amounts upon the last renewal notes which the defendant now holds against the plaintiffs. The answer also alleges that the first and second causes of action are barred by the Stat-



utes of Limitations for the reason that the action was not commenced within two years from the time the alleged usurious transactions are alleged to have occurred.

From the transcript of the evidence, it appears that the defendant is a man sixty-five years old, and resides near Pelican Rapids, Minnesota. He has never been engaged in any business except farming. He is not, and never has been, engaged in the business of making loans. The loan involved in this action is the only one which he ever made, with the single exception of one which he made to a near relative. The defendant is a man of very limited education. His correspondence was carried on largely by his wife, and his business transactions, such as preparing notes and computing the amounts due on notes to be renewed, were carried on through his banker, or attorneys engaged by him for that purpose.

The transactions out of which this action arose began in January, 1908. From January 2, 1908, to March 18, 1908, the defendant loaned the plaintiffs in all \$3,325, for which notes were taken. In September of that year he sold them some horses and advanced cash. The purchase price of the horses and the cash advanced aggregated in all \$825. Hence, the total original indebtedness of the plaintiffs to the defendant so incurred and evidenced by notes taken in 1908 aggregated \$4,150. It also appears that during the years 1909, 1912, 1913, and 1914, the defendant made further advancements to the plaintiffs, which according to defendant's testimony and documentary evidence aggregated in all \$5,068.70. There is some dispute as to some of the items which go to make up this aggregate, but the greater portion of these advancements are undisputed. There is no dispute with respect to what payments have been made by the plaintiffs. The original notes bear indorsements to the effect that the interest thereon up to November 1, 1908, has been paid.

It is significant that these are the only indorsements upon any of the notes, indicating that any interest has been paid. The evidence also shows that the defendant received the following payments from the plaintiffs: In January, 1910, \$75; in October, 1912, \$776.54; November, 1913, \$1,685.74; November, 1914 (or January, 1915), \$2,907.05. There is, however, no evidence showing the application made of these various payments. The plaintiffs nowhere testify or even intimate that they directed that these payments be applied upon

interest. As already indicated the defendant made advancements from time to time. The different notes were renewed from time to time. The renewal notes were taken as collateral, and the old notes were not surrendered. And upon the trial of this action the original notes taken in 1908, and the different notes subsequently taken, were all introduced in evidence. As already stated there are no indorsements upon the notes showing payments of interest, except those showing interest paid to November 1, 1908. The only deduction that can reasonably be drawn from the transactions as disclosed by the evidence is that the payments were applied generally upon the indebtedness of the plaintiffs, and that there was neither any direction by the plaintiffs that the sums paid be applied on interest, nor any mutual understanding between the parties that they should be so applied.

At the close of plaintiffs' case the defendant moved for a directed verdict on the ground that there was no evidence from which the jury could find "that any amount of usury has been paid if any at all has been charged and paid; and there is no evidence in the case from which the jury can determine what, if any, sum in excess of 12 per cent interest has been paid." And upon the close of all the testimony the defendant renewed the motion for a directed verdict and moved for such verdict upon the grounds, among others, that under the undisputed evidence the plaintiff had failed to establish any of the causes of action set forth in the complaint, and that the evidence shows clearly that there has been no usurious charge "paid by the plaintiffs for the loan or forbearance of the moneys loaned to them by the defendant." The motion for a directed verdict was denied, and the cause was submitted to a jury, which returned a verdict in favor of the defendant. The jury also found in answer to interrogatories submitted by the court that the defendant had not knowingly charged any bonus. Judgment was entered pursuant to the verdict for a dismissal of plaintiffs' action, and plaintiffs have appealed from such judgment.

Our statute relative to usury provides: "No person, firm, company or corporation shall directly or indirectly take, or receive, or agree to take or receive in money, goods or things in action or in any other way, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than 12 per cent per annum; and in the computation of interest the same shall not be compounded. Any viola-

tion of this section shall be deemed usury; provided, that any contract to pay interest not usurious on interest overdue shall not be deemed usury." Comp. Laws 1913, § 6073.

"The interest which would become due at the end of the term for which a loan is made, not exceeding ninety days' interest in all, may be deducted from the loan in advance, if the parties thus agree." Section 6075, Comp. Laws 1913.

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by §§ 6073 and 6075 when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred." Comp. Laws 1913, § 6076.

The last section is a duplicate of a provision contained in the National Banking Act, and was enacted in this state long after the original provision had been adopted by Congress.

It will be noticed that there are two entirely different provisions in § 6076, *supra*, and that each part applies to a different condition. It is first provided that where usurious interest has been knowingly contracted for, but not paid, the entire interest on the note or other evidence of indebtedness is forfeited. It is next provided that where such usurious interest has been paid the person by whom it has been paid, or his legal representative, may recover back, from the person who has taken or received it, twice the amount of the interest paid, in an action commenced within two years from the time the usurious transaction occurred. The purpose and effect of statutory provisions similar to § 6076, *supra*, have been considered by many of the courts of this country, including the Supreme Court of the United States. And the authorities are generally agreed that the statute provides for two different contingencies, or two distinct classes of usurious cases, and prescribes a different penalty as to each class. They further agree that in cases falling within the first provision,—*i. e.*, where usurious interest has been knowingly contracted for, but not paid,—all interest on the

usurious obligation is *ipso facto* forfeited, the debtor can defend against any claim for interest, and the creditor can recover only the sum lent, without any interest whatever. But in cases falling within the second provision,—i. e., where the debtor has in fact paid interest upon the usurious contract,—he cannot plead such payment either as a credit on, or as an offset or counterclaim to, the principal; but his only remedy is to maintain the action to recover the penalty provided for in the second part of § 6076, *supra*. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129; *Haseltine v. Central Nat. Bank*, 183 U. S. 182, 46 L. ed. 118, 22 Sup. Ct. Rep. 50; *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Walsh v. Mayer*, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260; *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 337; *McCarthy v. First Nat. Bank*, 23 S. D. 269, 23 L.R.A.(N.S.) 335, 121 N. W. 853, 21 Ann. Cas. 437. In other words the courts uniformly hold that the remedy afforded by the statute is exclusive, and that a party who desires to claim the right granted by the statute must avail himself of the remedy therein prescribed, and can resort to no other form or mode of procedure.

As already indicated the instant action is brought under the second provision of § 6076, *supra*, to recover twice the amount of interest alleged to have been paid upon a usurious contract. The action is one for the recovery of a penalty. *First Nat. Bank v. Morgan*, 132 U. S. 141, 144, 33 L. ed. 282, 283, 10 Sup. Ct. Rep. 37; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 558, 25 L. ed. 212, 213. In such action the defendant is charged with violating the law and thereby rendered liable for the penalty. It is elementary that a party who asserts a right to recover from another has the burden of establishing such right by a preponderance of the evidence. It is equally elementary that a violation of law is never presumed, and one who alleges such violation and predicates the right to recover a penalty thereon has the burden of proving the existence of the facts alleged. 39 Cyc. 1050; 30 Cyc. 1357.

Under the plain words of the statute an action to recover the penalty prescribed by § 6076 lies only "in case the greater rate of interest has been paid." A party who seeks to recover the penalty must therefore

allege and prove that such "greater rate of interest" has actually been paid. The statute contemplates an actual payment, and not merely a further promise to pay. The statute clearly makes a difference between interest which a note, bill, or other evidence of debt "carries with it, or which has been agreed to be paid thereon," and interest which has been paid. Interest is not "paid" within the meaning of the statute when included in a renewal note or evidenced by a separate note. "The time the usurious transaction occurred" has reference to the actual payment of the interest from which the penalty arises. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 419, 42 L. ed. 801, 802, 18 Sup. Ct. Rep. 390; *First Nat. Bank v. Lasater*, 196 U. S. 115, 118, 49 L. ed. 408, 409, 25 Sup. Ct. Rep. 206; *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658.

As already stated, there is no evidence in the case at bar showing that the plaintiffs have paid any interest whatever to the defendant, or that any of the payments made have been so received by the defendant, with the single exception of the payments made for interest up to November 1, 1908. This payment is not involved in this litigation, however. No claim is made, therefore, in the complaint, and manifestly an action for its recovery would be barred by the express provisions of the statute.

Under the statute, a usurious obligation bears no interest. All interest thereon is *ipso facto* forfeited. And such forfeiture is not waived by the giving of renewal notes. Nor do such new notes operate as payment of the usurious obligations for which they are given, but in so far as they embrace forfeited interest, the new notes are without consideration. *Brown v. Marion Nat. Bank*, *supra*. Under the evidence in this case, the court would not be justified in applying the payments made by the plaintiffs as upon interest. See 39 Cyc. 1026. Hence, the plaintiffs clearly failed to establish any cause of action against the defendant, and the court should have granted the motion for a directed verdict. It would therefore serve no useful purpose to discuss the errors assigned upon the court's instructions to the jury, as the verdict was clearly right. *Driesbach v. Second Nat. Bank*, *supra*. The judgment appealed from must be affirmed. It goes without saying that the decision in this case will not, and does not, bar the plaintiffs from defending against the paying of interest on the obligations which

they owe the defendant, on the ground that all interest is forfeited on account of usury. Hence, if any usury exists, the plaintiffs still have ample remedy.

Affirmed.

GRACE, J. I concur in the result.

### On Petition for Rehearing.

**PER CURIAM.** Plaintiffs have petitioned for a rehearing. It is contended that the record "shows the payment of interest, and the exact amount paid upon interest." This contention is based upon certain statements in defendant's answer and certain answers given by him during his cross-examination. The point was not raised by appellant on the presentation of the case, but at that it was not overlooked by this court. On the contrary the question was called to the attention of the members of the court in a memorandum circulated with the former opinion, and was fully considered by them.

It is true there are certain statements in the answer of the defendant which are really admissions that some of the payments received by the defendant had been applied by him upon interest. But plaintiffs certainly did not rely upon these as judicial admissions. Defendant's testimony, and certain statements prepared by him as to the application of the payments received, are in effect directly contrary to such alleged admissions in the answer. In fact such testimony and such statements are to the effect that the money received by defendant was not applied upon interest at all, but was applied in payment of the subsequent advances made by the defendant,—and the answer also alleges, among other things, that the moneys were applied in payment of such advances. And as stated in the former opinion no portion of the payments received by the defendant were indorsed upon any of the notes as and for interest payments, or at all. It will also be noted that defendant's motion for a directed verdict (set out in the former opinion) was based upon the theory that the moneys received by defendant had not been applied upon interest. And during the course of the argument of plaintiffs' counsel to the jury, an incident occurred which is quite illuminating.

We quote from the record:

Defendant's counsel: We take exception to the remarks of counsel, there being no testimony in the record showing the payment of any interest at any time; the testimony showing that statements were drawn up, which were tabulated and for which general credits were given for the crops, the place as to where the same were applied not being stated, but it was simply a matter of figuring up the interest, and the statements balanced, and new notes being taken for the balance, there being no evidence of any interest being taken at any time; there being no testimony either of any interest being taken at any time.

The Court: Sustain the objection.

Plaintiffs' counsel: Now, am I permitted to argue on that, your Honor?

The Court: Not after the ruling, no.

Plaintiffs' counsel: The ruling comes before that. I just wanted the record to show, that is all.

It will be noted that plaintiffs' counsel in no manner intimated that there were any judicial admissions in support of the proposition he had been arguing.

In a brief presented by the defendant in this case, it was said:

"Before the plaintiffs could possibly recover in such an action as this, it must be shown that the interest has been paid by them. No proceeding has been taken by the defendant to enforce his claim against the plaintiffs. If they are entitled to this penalty, they must show the payment of the interest before they can recover it. They cannot recover the interest here for the purpose of offsetting it against a demand in a proceeding to foreclose the defendant's mortgages. There are two memorandum statements which are among the exhibits in this case, and they are marked with blue pencil X and XX. On the statement marked X is a memorandum taken from the evidence and the exhibits showing the total amount of moneys advanced for and loaned to the plaintiffs.

"Before the taking of the new note and mortgage for \$9,000, the \$9,000 note being exhibit 29, the amount of those advances and loans aggregated \$7,987.80. After the settlement and the making of the new \$9,000 note and the mortgage securing the same, and up to the

25th of January, 1915, the defendant paid out in discharge of encumbrances and other obligations of the plaintiffs the sum of \$1,230.90; such payments being made with the consent and the approval of the plaintiffs and in order that the mortgage which the defendant took should be a first mortgage on the real property described in it. That made a total of loans and advances of \$9,218.70.

"Referring now to the memorandum marked XX we find that the total amount of moneys paid by the plaintiffs since the beginning of this contract is \$5,424.33. Now, the original loan was considered \$4,150, the particular notes being referred to on the said memorandum XX, so that aside from the principal loan there was money actually advanced and paid out for liens, taxes, and other mortgages, and for horses, for the burial of his father, and sundry items of machinery, and seed grain, making the total above referred to of \$9,218.70. If we deduct from that total sum the amount of the original five notes of \$4,150, we will show that there were subsequent advances of sums from \$3 up to \$2,000, aggregating \$5,068.70.

"Now, the record shows that there were payments made on four particular dates between January, 1910, and January, 1915; that the total of those payments was \$5,424.33 or \$355.63 over and above the amount of moneys actually advanced after the original loan of \$4,150. *That these payments of money, as indicated on the statement XX, were applied to the discharge of the subsequent advances, is unquestionable, and it was the right of the defendant to so apply them, in the absence of proof that some other application was demanded.* If the total payments to the defendant by the plaintiffs were properly applied to the extinguishment of the subsequent advances listed on memorandum X, then there could have been payment of no interest on any of them in excess of the sum of \$355.63. It will be observed that the figures given in the memoranda marked X and XX include no interest, and it was perfectly fair to assume, as the jury must have done, that the entire \$5,424.33 was absorbed in the discharge only of the subsequent advances made by the defendant after the original loan was made. If that be so, how can the plaintiffs claim that they have paid the interest, or any interest contracted for in this case, or exacted from them by the defendant? It is incumbent upon them to prove in such manner as would satisfy the jury that they have paid interest upon the entire debt,



or that at least so much thereof as would entitle them to the amount which they claim. It is perfectly apparent that the plaintiffs have taken the position that all of the payments they made must have been applied on interest. That does not follow. The defendant was making them loans from \$10 to \$250 and \$2,000 at frequent intervals during the whole term of eight or nine years, and it is not to be supposed that he was applying the moneys received from the plaintiffs to the payment of interest only, but rather that he was applying it to the payment of the later advances, leaving the original loans secured by the mortgages which were originally given for that purpose."

The answers of the defendant to which reference is made were elicited during cross-examination. He stated that he could not answer, and did not know how much money had been applied on interest, but that he thought his attorney could tell. When asked in regard to the statements in the answer already referred to, he stated that he thought the answer to be as near correct as he could get it, or remember it. But these isolated statements are not defendant's testimony. His testimony should be considered as a whole,—which was doubtless the way the jury considered it. Defendant's testimony so construed showed no application of any part of the moneys paid to interest.

As already stated in the former opinion, defendant was not a man used to carry on business transactions of the kind involved herein. He couldn't even compute interest, or prepare a promissory note for signature. He relied upon others to do these things for him. He turned his papers over to his attorney, and his attorney prepared the answer. While the admissions in the answer would have been binding if invoked, the parties had a right to place their own construction upon the pleading and the issues framed. Under the facts in this case it seems clear to us that plaintiffs placed no reliance upon the so-called admissions in the answer. Plaintiffs' theory, both in the court below and in this court, was and is that all payments received by the defendant must *ipso facto* be deemed applied upon interest. In fact this theory is still adhered to in the petition for rehearing. Referring to the statement showing the amount of moneys advanced by the defendant, and the sums paid by the plaintiffs, it is said that such statement shows "the total amount paid as \$5,424.33." And the contention is advanced that "this shows over \$5,000 paid in interest." This theory, as we

held in our former opinion and still hold, is unsound. It is contrary to the overwhelming weight of authority (39 Cyc. 1026), and would largely defeat the purpose of the usury statute.

The rule is elementary that where the parties act upon a particular theory in the trial court, they will not be permitted to depart therefrom when the case is brought up for appellate review. This is true of the construction placed upon pleadings. 3 C. J. p. 725. It is true as to the relief sought and the grounds therefor. 3 C. J. p. 730. It is true generally as to the theories acted upon by the parties in the court below. See 3 C. J. pp. 718 et seq. A party cannot proceed with a trial upon one theory, and advance another and inconsistent theory on appeal. A party cannot be heard to say for the first time on appeal that a certain issue does not in fact exist because of certain admissions in the pleadings. We adhere to the former opinion. A rehearing is denied.

GRACE, J. I concur in the result.

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**ALLEN VANEVERY, Respondent, v. MINNEAPOLIS, ST. PAUL,  
& SAULT STE. MARIE RAILWAY COMPANY, a Corpora-  
tion, Appellant.**

(171 N. W. 610.)

**Master and servant — negligence — injury of servant.**

In January, 1916, at Minot, the plaintiff was in the employ of defendant. His business was on the evening of each day to fill with coal the tender of a switching engine, by shoveling the same from a coal dock adjacent to the tender. By attempting to step from the tender onto the edge of a plank,—the near side of the coaling dock,—and to walk the edge of the plank, the plaintiff lost his footing and fell some 3 feet between the coal dock and the tender, and was badly hurt. The plaintiff's injury was not caused by the negli-

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NOTE.—For a discussion of the question as to when employees are engaged in interstate commerce within the meaning of Employers' Liability Acts, see subdivision VII. of comprehensive notes in 47 L.R.A.(N.S.) 52, and L.R.A.1915C, 56, on application and effect of the Federal Employers' Liability Acts generally.

gence of defendant or of any of its employees, or by reason of any defect or insufficiency in its cars, engines, or appliances. Hence the plaintiff has no cause of action.

Opinion filed November 26, 1918. Petition for rehearing February 27, 1919.

Appeal from the District Court of Ward County, Honorable *K. E. Leighton*, Judge.

Judgment for plaintiff. Defendant appeals.

Reversed and dismissed.

*John E. Greene* and *John L. Erdall* (*Alfred H. Bright*, of counsel), for appellant.

It is not clear from the decisions of the Federal Supreme Court just what work is so connected with interstate commerce as to give an employee the benefit of the Federal Employers' Liability Act. 35 U. S. Stat. at L. 65 et seq.; Comp. Stat. §§ 8657 et seq.; *N. Y. Cent. R. Co. v. Carr*, 238 U. S. 260; *C. B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 942; *Shanks v. Del. L. & W. R. Co.* 239 U. S. 556, 60 L. ed. 436; *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051; *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed. 319; *M. & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. ed. 358; *Lehigh V. R. Co. v. Barlow*, 244 U. S. 183, 61 L. ed. 1070.

The railroad is not required to exercise toward its employees that high degree of care required of a carrier of passengers with respect to the safety of its passengers. 4 *Thomp. Neg.* §§ 3773, 3767; *Armour & Co. v. Russell*, 6 L.R.A.(N.S.) 603, 604, and see extended notes pp. 602-609 (C. C. A.) 144 Fed. 614.

The master is not required to furnish a place to work that is absolutely safe, or the safest possible place, but only one that is reasonably safe. *Streeter v. West Wheeled Scraper Co.* 250 Ill. 244, Ann. Cas. 1913, chap. 204; 4 *Thomp. Neg.* § 2773; *Jungnitz v. Mich. &c. Iron Co.* 105 Mich. 270, 63 N. W. 296; *Stiller v. Bohn Mfg. Co.* 80 Minn. 1, 82 N. W. 982; *Wood, Mast. & S.* § 331; *Bailey, Mast. & S.* § 57; 26 *Cyc.* 1106, 1107.

For plaintiff to show that he has been injured under circumstances which may lead to a suspicion or fair inference of negligence on the part of defendant is not sufficient, he must go on and give evidence of some specific act of negligence on the part of the defendant. *Longe-*

grove v. London &c. R. Co. 16 C. B. N. S. 692; 4 Thomp. Neg. § 3865; Lane v. R. Co. 64 Kan. 755, 78 Pac. 626; Reed v. Boston R. Co. 164 Mass. 129, 41 N. E. 64.

One who knowing and appreciating a danger voluntarily assumes the risk of it cannot complain against another who is primarily responsible for the existence of the danger. O'Malley v. Boston Gaslight Co. 47 L.R.A. 161; Streeter v. Western Wheeled Scraper Co. 250 Ill. 244, Ann. Cas. 1913C, 204; American Bridge Co. v. Valente, Delaware, 73 Atl. 400.

A verdict of \$10,000 in this action is unwarranted by the evidence. Clark v. Brooklyn Heights R. Co. 78 N. Y. App. Div. 478, 76 N. Y. Supp. 811; Waterman v. M. St. P. & S. Ste. M. R. Co. 26 N. D. 548.

*E. R. Sinkler and Greenleaf, Woledge, & Lesk, for respondent.*

It is immaterial whether plaintiff was engaged in intrastate or interstate commerce. Fed. Employers Liability Act, § 3; N. D. Employers Liability Act, § 2; Kansas City W. R. Co. v. McAdow, 240 U. S. 51, 60 L. ed. 520; Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452; Eley v. C. G. W. R. Co. 166 N. W. 740; Wabash R. Co. v. Hayes, 234 U. S. 86, 6 N. C. C. A. 224; Troxell v. Delaware R. Co. 185 Fed. 540; Galveston R. Co. v. Averill (Tex.) 136 S. W. 98.

Plaintiff's work was interstate commerce. N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, 14 N. C. C. A. 680; So. R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321; Kamboris v. Oregon, W. R. & Nav. Co. 146 Pac. 1097; C. R. I. & P. R. Co. v. Bond (Okla.) 148 Pac. 103; So. R. Co. v. Peters (Ala.) 69 So. 611; So. Pac. Co. v. Pillsbury (Cal.) 151 Pac. 277; Grybowski v. Erie R. Co. (N. J.) 95 Atl. 764; So. Pac. Co. v. Industrial Acci. Commission, L.R.A.1917E, 262, 161 Pac. 1139; Sears v. Atlantic C. L. R. Co. (N. C.) 86 S. E. 176; Mattocks v. C. & A. R. 187 Ill. App. 529; Tralich v. C. M. & St. P. R. 217 Fed. 675; Lombard v. Boston & M. R. Co. 223 Fed. 427; Ross v. Sheldon (Iowa) 154 N. W. 499; C. C. & St. L. R. Co. v. Farmers Trust Co. 108 N. E. 108.

Negligence and assumption of risk are for the jury. O'Driscoll v. Faxon, 156 Mass. 527, 31 N. E. 685; Blondin v. Oolite Quarry Co. (Ind.) 37 N. E. 812, affirmed on rehearing 39 N. E. 200; Wood v.

Victor Mfg. Co. 66 S. C. 482, 45 S. E. 81, 14 Am. Neg. Rep. 629; Wyldes v. Patterson, 24 N. D. 218, 139 N. W. 577; Messenger v. Valley City St. R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; Davy v. G. N. R. Co. 21 N. D. 43, 128 N. W. 311; Umstad v. Colgate Farmers Elevator Co. 18 N. D. 309, 122 N. W. 390; Cameron v. G. N. R. Co. 8 N. D. 124, 77 N. W. 1016; Stone v. N. P. R. Co. 29 N. D. 496, 151 N. W. 36; Messer v. Bruening, 32 N. D. 515, 156 N. W. 241; Olson v. Gray, 147 Cal. 112, 81 Pac. 415; Bessex v. C. & N. W. R. 45 Wis. 477; John Spry Lumber Co. v. Duggan, 182 Ill. 218, 54 N. E. 1002; Kennedy v. L. S. R. Co. 93 Wis. 32, 66 N. W. 1137; U. P. R. Co. v. Erickson, 41 Neb. 1, 59 N. W. 347; Cintek v. Stimpson R. Co. (Wash.) 37 Pac. 340; Libbey v. Scherman (Ill.) 34 N. E. 801; McCauley v. Norcross (Mass.) 30 N. E. 464.

The damages awarded plaintiff were not excessive. Pratt v. Pioneer Press Co. (Minn.) 20 N. W. 87; Stutz v. Chic. N. W. R. (Wis.) 40 N. W. 657; Bowers v. U. P. R. Co. 4 Utah, 215, 7 Pac. 251; Morgan v. So. Pac. Co. (Cal.) 30 Pac. 601; Scottowe v. Oregon S. L. R. Co. 30 Pac. 222; Gennaux v. N. W. I. Co. 72 Wash. 268, 130 Pac. 495; Chicago & E. I. R. Co. v. Holland, 18 Ill. App. 418; Reddon v. U. P. R. Co. 5 Utah, 233, 145 U. S. 657, 36 L. ed. 48; Cooper v. St. Paul City R. Co. 54 Minn. 379; Marks v. Hurley, 73 Wash. 437, 131 Pac. 1122; Mulhollan v. Western Gas Co. (Cal.) 131 Pac. 110; Yellow Pine Co. v. Lyons (Tex.) 159 S. W. 909; Dolphin v. Peacock Min. Co. (Wis.) 144 N. W. 112; Houston & T. C. R. v. Menefee (Tex.) 162 S. W. 1038.

ROBINSON, J. This is a personal injury suit in which defendant appeals from a verdict and judgment for \$10,000.

In January, 1916, at Minot, the plaintiff was in the employ of defendant, and his daily business was to shovel coal so as to fill the tender of a switch engine. At the close of each day the engine and tender was spotted opposite the coaling dock and in such a way as to make it most convenient to throw the coal onto the tender. The dock was of timber and planks. It was 44 by 11½ feet. The longest side was parallel to the railroad track and at a proper distance of 18 inches from the side of the spotted tender. The coaling dock was constructed and it was loaded with a view of making it easy to throw the coal into

the tender. Its floor was about 3 feet above the ground and on a level with the floor of the engine and tender. The sides and ends were made of planks to prevent the coal from rolling off. The farthest side had five tiers of planks, and the nearest side, one tier of 10-inch planks, which were 2 or 3 inches thick.

On the night of the accident the dock was loaded with coal to a depth of about 5 feet in the center, and, excepting a clear space of about 10 feet at each end, the coal was plumb up and a little above the level of each side. On the lower side it was probably a little heapy. On the east end of the dock the plaintiff got onto the clear floor and for one hour he shoveled coal into the tender. Then he got off, went to the adjacent roundhouse, and on returning to the place where he had left his shovel, instead of getting onto the clear platform where he got off, he attempted to return by walking on the edge of the 10-inch plank. With a lighted torch lamp in his right hand he stepped from the gangway of the cab or tender onto the plank which was heaped with coal. The distance was 18 inches, and as he says: "You would have to use a little force to make the step." Of course he had to step against the coal with both feet, and the result was that the coal commenced rolling onto the edge of the plank. Then he had no footing and as a natural result he fell 3 feet between the dock and the tender and was badly hurt, though he was able to get up and walk home. There was no occasion or necessity for plaintiff to walk the edge of the plank; it was never made for that purpose. During four months the plaintiff had been working at the business, and he knew well the conditions of the dock and the coaling. There is not a particle of evidence to show that the coaling dock was in any way defective or that the defendant, or anyone of defendant's agents, was at fault.

Under the statute an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

An employer is not bound to indemnify his employee for losses suffered in consequence of the ordinary risks of the business in which he is employed. Section 6107.

But plaintiff claims under the Employers' Liability Act, which is to the effect that a common carrier, engaged in interstate commerce, is liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for an injury resulting in whole or

in part from the negligence of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, warehouses, or other equipment. And in such action the negligence of the employee is not a bar to any recovery, and he is not held to have assumed the risk of his employment.

However, in this case it appears to the writer of this opinion that the plaintiff was not employed in interstate commerce. The majority are agreed, however, that the accident was not the result of any fault or want of care on the part of the defendant or its employees. It was the result of the plaintiff attempting to get on and to walk the edge of a plank, and that was entirely outside of his employment. It is much the same as if he had suffered the injury by attempting to walk a rope. Hence the plaintiff has no cause of action. Judgment reversed and action dismissed.

GRACE, J. (dissenting). The action is one for damages. In his complaint, the plaintiff, in substance, alleges and sets forth a cause of action against the defendant for the negligence of the defendant. The negligence of the defendant is alleged to be that it negligently and carelessly piled and placed on a certain coal dock a large quantity of coal, and had negligently and carelessly placed said coal on said dock in an unsafe and dangerous condition; that while plaintiff was in the act of stepping from the cab of the engine to the coal dock, a large piece or a quantity of coal, which the defendant had negligently and carelessly left in an unsafe and insecure position on the pile of coal on the dock, started to fall and rolled down the pile of coal, which piece of coal rolled under the foot of the plaintiff, and plaintiff stepped on the piece of coal, lost his balance, and was thrown and precipitated from the cab and coal dock to the ground between the engine and coal dock, receiving and sustaining dangerous, severe, and permanent injuries; that such injuries were received by reason of the carelessness and negligence of the defendant in failing to properly keep and maintain such coal dock, and by reason of the defendant's carelessness and negligence in failing to furnish a safe place for the plaintiff in which to work, and by reason of the defendant in keeping and maintaining said place in an unsafe and dangerous condition and the defendant's care-

lessness in piling a large amount of coal on the dock in a high pile in such condition that large chunks of the same rolled down from the pile of coal. Plaintiff further, in substance, alleges that defendant had negligently and carelessly failed to construct, keep, and maintain the coal dock in a safe condition, and the same was, at the time, in an unsafe and dangerous condition, and so constructed, kept, and maintained that at certain times the coal would roll off said coal dock; that the defendant negligently and carelessly failed to keep and maintain sufficient planks for the support of said coal to prevent same from rolling off from said dock. That plaintiff further alleges, the defendant is a corporation existing under and by virtue of the laws of North Dakota and engaged in the business of common carrier, freight and passenger, in the state of North Dakota, Minnesota, and other states, and conducted the main line of railway of common freight car and passenger through the state of North Dakota and the state of Minnesota, which said main line of defendant's railway passed through the city of Minot in the state of North Dakota; and that the said defendant, at all times mentioned in the complaint, owned, operated, and conducted the engines, cars, sidetracks, roundhouses, and coal docks and houses along the line of the defendant's railway; that said defendant, at all times mentioned in the complaint, was and is engaged in interstate commerce by railway and on the line of railway mentioned; that in connection with the business of defendant as interstate carrier of freight and passenger in the city of Minot, on the 22d day of January, 1916, prior to said time and since that time, defendant had constructed, kept, and maintained in the city of Minot what is known as a coal dock, where the defendant stored and kept a supply of coal for engines used by defendant in interstate commerce; that said coal dock was constructed, kept, and maintained by defendant on or near the sidetracks of defendant in the city of Minot; that the plaintiff was in the employ of the defendant as engine watcher and helper; that it was one of the duties of plaintiff, while he was employed by defendant, to fill with coal the engines owned, used, and operated by the defendant in interstate commerce.

Defendant, in his answer, admits that on or about the 22d day of January, 1916, the plaintiff was in the employ of the defendant as a helper about the roundhouse, which the defendant maintained in the city of Minot, and that it was one of the duties of the plaintiff, as a part



of his employment, to fill with coal the tender of a certain switch engine used and operated by the said defendant in switching cars in the yards of the defendant in the city of Minot. The defendant denies that, at the time of plaintiff's alleged injuries, he was engaged in the work connected with interstate commerce or in the preparation of equipment of any of the defendant's engines or appliances used by the defendant in interstate commerce, and denies that the coal dock or platform referred to in the complaint, and on which the defendant stored and kept his supply of coal, was so kept or maintained or that coal was so provided and kept thereon for the purpose of supplying coal for engines used by defendant in interstate commerce, and that said platform and supply of coal were maintained for the purpose of supplying coal for one of the switch engines used exclusively in the switch yards at Minot for switching cars, and for the coaling of certain other engines used by the defendant in intrastate traffic exclusively, said engine being operated on a branch line of the defendant, said road being wholly within the state of North Dakota. The defendant denies that it was guilty of any negligence in the maintenance, construction, or operation of the coal dock or platform, or in placing and keeping coal thereon, and alleges that the platform was properly constructed for the purpose for which it was used, and that coal was placed and kept thereon in the customary and usual and in a proper manner. Defendant further alleges that while it was a part of the work for which the plaintiff was employed to shovel coal from said dock or platform into switch engines in the evening of each day, said plaintiff was thoroughly familiar with the work, and that in shoveling coal from the platform into said tender it was natural that coal thereon should roll from the top of the pile from said platform towards the bottom thereof; that coal could not be removed therefrom or from any dock or coal shed under any other condition; that said conditions were, at all times, plainly to be seen by and apparent to the plaintiff, and that the risk of injury from coal so rolling, as described in the complaint, was known to and assumed by the plaintiff when he entered such employment and during all the time of his employment and at the time of the alleged injury set out in the complaint, and denies that the injuries, if any, sustained by the plaintiff, were caused by the negligence and carelessness of the defendant, and alleges that if the plaintiff was injured, as alleged in

the complaint or otherwise, such injuries were the direct result of the negligence and carelessness of the plaintiff, and not otherwise.

The material facts, concisely stated, are as follows:

The plaintiff was in the employ of the defendant from sometime in September, 1915, until January 22, 1916, as engine watcher and helper in the roundhouse at Minot. Other duties were to watch the engine used in the Minot yard while it was in the roundhouse at night; keep the fire therein, and, during the night, fill the tender of the switch engine with coal for use of the engine, the coal being shoveled from the dock in question by the plaintiff into the tender. Plaintiff's hours of work were at night, and usually from 6 o'clock in the evening to 7 o'clock the following morning. The coal dock was in the front of and east of the roundhouse, and on the south side of the railway track that entered the roundhouse. It appears to have been about 45 feet in length and  $12\frac{1}{2}$  feet wide and  $3\frac{1}{2}$  to  $4\frac{1}{2}$  feet in height from the ground. Coal was kept upon such dock, from which the switch engine was coaled, and the testimony of witness Vickerman shows that other engines were coaled at the dock in question, denominating such engines as extra engines. On each end of the side of the coal dock and on the side furthest from the railway track, there were plank walls about  $4\frac{1}{2}$  feet in height. On the side of the dock which fronted on the railway track, there was no wall excepting a plank 3 inches thick and 10 inches high. The switch engine in question was used for handling both interstate and intrastate shipments, or, in other words, it was used for handling and switching cars, some of which were loaded with goods for interstate and some intrastate shipments. Plaintiff was a young man between the age of twenty-three and twenty-four at the time of the injury, and was little less than twenty-five years of age at the time of the trial, and was receiving as wages \$71 per month at the time of his injury. According to witness Britton, he went down to the dock at about 6 o'clock on the evening of the day of the plaintiff's injury, and he stated in his testimony the coal was low at the west end and low at the east end of the dock, and that there was practically 8 or 10 feet on the east end that had no coal at all, but in the center of the dock the coal looked as though it were piled about 5 feet high, which would make it about  $4\frac{1}{2}$  feet above the board next to the track. There appear to have been no steps, ladder, or approaches for getting on or off the dock. Plaintiff was shoveling

coal from the dock into the tender of the engine from near the east end of the dock. He went to the roundhouse to attend to some work and in a short time returned, went upon the engine to attend to the fire and steam, came from there and went to the engine platform between the cab and tender and attempted to step upon the coal dock, which was about the level with the engine platform. He had an oil-can torch in his hand and was returning to the dock to finish coaling the engine. As he stepped toward the dock, intending to step upon the 10-inch plank, a quantity of coal slid forward from the pile of coal toward the engine over the top of the 10-inch plank, and in such manner and time that the plaintiff stepped upon the chunk of coal and was thrown to the ground between the switch engine and the dock, and received the injuries for which damages are sought.

One of the questions presented before our consideration and decision is: Was the plaintiff, at the time of his injury, employed in interstate commerce within the meaning of the Federal Employer's Liability Act? That part of the Employer's Liability Act which relates to the question under consideration is as follows: "Every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce." [35 Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208.]

The real questions presented in this branch of the case are: Was the plaintiff, at the time of the injuries, engaged in doing an act or performing a service within the scope of his employment which contributed to and aided in carrying on interstate commerce? Was the plaintiff, at the time of the injuries, engaged in the rendering of services which assisted and contributed to the carrying on of interstate commerce? Could the defendant have carried on the interstate commerce over that part of its railway line and yard at Minot and have wholly dispensed with the services which plaintiff rendered or similar services? Was the service which plaintiff rendered a material part, however small, of interstate transportation? We are of the opinion that an

affirmative answer should be given to the first two and the last of the above questions, and a negative answer to the third question. Unless the plaintiff or other employee rendered service to the defendant such as plaintiff rendered, the switch engine which contributed in the moving and carrying on of the interstate commerce could not perform its service, which would be just as necessary in the general plan of carrying on interstate commerce as the engine which hauls the goods and merchandise transported within or without the state. The switch engine would be useless unless it were properly supplied with coal and properly taken care of, so that it could render the service for which it is intended. The different contributions of service to carry on interstate commerce may vary in degree, but if they contribute to the general plan or business of carrying on interstate commerce, they are part of it.

The part of the statute which we have quoted, in short, provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce. As we view it, the statute should be given a liberal construction to effect the purpose for which it was enacted, in preference to a technical construction which would practically have the effect to make the statute inoperative and ineffective to accomplish the purposes intended by its enactment. The part of the statute under consideration does not say that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injuries, if, at the time of receiving such injuries, the person is engaged in performing acts of interstate commerce; but the statute says while he is employed by such carrier in such commerce. In other words, the purposes for which the person is employed and the continuance of the employment for that purpose to and including the time of the injury, as we view it, are what is, in fact, meant by the language of the statute quoted. If part of the duties at all times, of the person employed, is to render or contribute service which aids in carrying on interstate commerce, he is, at all times during the time of his service, employed in interstate commerce; for, at all times, he has the duty to contribute service which aids in carrying on interstate commerce, and this is true even though there is another duty to contribute service in intrastate commerce, and he may be said to be employed all the time for each purpose. If, under these circum-

stances, the person so employed is injured, he is injured while employed in interstate commerce; for his general duties hold him, at all times, to the performance of acts contributing to the carrying on of interstate commerce. If the person's employment and if he has a duty resting on him at all times during his employment to aid in and contribute to the carrying on of interstate commerce, he is engaged in assisting and carrying on interstate commerce, and must be held to be employed in such work, and this even though there is another duty resting on him to carry on intrastate commerce. As we have stated, the statute should receive a broad, liberal construction to effectuate the purposes for which it was enacted. We are satisfied the plaintiff, at the time of the injury, was engaged in work which contributed, in some degree, to the carrying on of interstate commerce.

We have examined with much care the cases cited by the appellant and find nothing therein which would change the view we have of this question. Facts in most of the cases cited are materially different than the one at bar, and for that reason the conclusion reached in such cases might be different than the one we have reached in this.

The next question for our consideration is the question of negligence and contributory negligence. These questions were for the jury. It decided them in favor of the plaintiff and we think properly so. It cannot be said, as a matter of law, that the verdict is not sustained by the evidence, or that the verdict finds no support in the evidence. It appears from the records in this case and from the testimony, that the coal dock in question was some  $3\frac{1}{2}$  to 5 feet from the ground; that there was no means provided for an employee to get on and off the dock. That is, there was no ladder or any other means by which any employee might get on or off the dock. This being true, the employee was at liberty to select any means of getting on or off the dock he saw fit. There is no showing, in the testimony, that there was any particular way in which the plaintiff should have gotten on or off the dock; and the fact that he got onto the dock from the floor of the cab rather than have gotten down on the ground and crawled up on either side makes no difference in this case. He was not guilty of negligence by having attempted to step directly from the cab of the engine across to the coal dock, it being only a distance of 18 inches from the cab floor to the 10-inch plank on the coal dock. It appears that the coal was piled high on

a part of the coal dock, and, as the testimony shows, to a height of about 5 feet. It is easily seen that this is a great deal higher than the 10-inch plank on the side of the coal dock next to the 10-inch plank. If the defendant had placed more boards on the side of the coal dock next to the railroad track, the coal could not have rolled off and the injury could not have happened. All these questions were for the jury, and all the testimony in regard to these matters tended to establish negligence against the defendant. The plaintiff carried a torch when he attempted to step from the cab of the engine upon a 10-inch plank, and it appears from his testimony that just as he was about to step upon the 10-inch plank the quantity of coal rolled under his foot and he lost his balance and was thrown to the ground and severely injured. All the facts relative to the negligence of the defendant or the contributory negligence, if any, of the plaintiff, were submitted to the jury and they have found in favor of the plaintiff, and we think the verdict is supported by the evidence; and it cannot be said, as a matter of law, that the acts of the defendant and his conduct, as disclosed by the testimony, did not constitute negligence. The master is bound to use ordinary care to provide a safe place for the servant in which to perform his duties. In view of all the testimony in this case, we think the same tends to show the failure of the master to exercise such ordinary care, and the jury, by its verdict, so found, and the matter being a question of fact for the jury, it is its exclusive province to determine it.

The next question for consideration is the defense of assumption of risk. There is nothing in the testimony to show that the dangerous conditions which caused plaintiff's injury were at all obvious or could be reasonably anticipated, or that the plaintiff knew of and appreciated the dangers, if any. If the dangerous condition of the coal dock is chargeable to the negligence of the master if the coal thereon was piled in careless and negligent manner so that a portion of it rolled down and under plaintiff's feet at the instant of time he attempted to step upon the 10-inch plank and he was thereby thrown to the ground and injured, as shown by the testimony, the proximate cause of the injury is the master's negligence, and he should not be relieved from it, nor escape the consequence of his negligence by imposing the burden of his negligence upon the plaintiff under the doctrine of assumption of risk.

There is nothing in this case to show that the plaintiff knew or appreciated any danger or voluntarily assumed any risk. The jury determined all facts in favor of the plaintiff and thereby disposed of them, including the question of assumption of risk, and we think they reached the correct conclusion.

As to the question of excessive damages, we think the damages not excessive in view of the serious injury which the testimony shows the plaintiff received. We think there can be no merit in the claim of excessive damages. The testimony tends to show that plaintiff received serious injury to the lower part of his spine. He was treated by three different doctors, and the whole period of time in which he was under physician's care was between nine and ten months. The amount claimed by one of the physicians to be a reasonable charge for his services was \$500. The testimony does not show how much was due or claimed by each of the other physicians. The plaintiff endured much suffering and pain and was exceedingly nervous. There is nothing in the record to indicate passion or prejudice. The question of the amount of damages is exclusively one for the jury. The verdict in this case is clearly not excessive. We think, also, that the recovery in this case may be had either under the Federal Employers' Liability Act or our own statute relative to railroad employers' liability, which is chapter 207 of the Laws of 1915, for the law of the case is practically the same under either. The liability of the defendant, under either law, would be practically the same. When such is the case it is really immaterial whether the employee was engaged in interstate or intrastate commerce. This was the holding in the case of *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857.

Defendant assigns many errors based upon the court's alleged error in overruling defendant's objection to many questions which related to the question as to whether or not defendant was engaged in interstate commerce. We think the court properly ruled on all such objections and properly admitted the answers to such questions and testimony. We have carefully examined all the facts in connection with this case as disclosed by the testimony and have examined the authorities cited by defendant, but find no reason for coming to any other conclusion than the one at which we have arrived; nor can we find any sufficient

error of law in the matter to warrant us, in any manner, interfering with the deliberate judgment of the jury as expressed in its verdict in plaintiff's favor. There was a fair trial, correct instruction of the law given, the facts fairly submitted to the jury, and the verdict is supported by the evidence.

### On Petition for Rehearing.

**PER CURIAM.** Plaintiff has petitioned for a rehearing. The petition assumes that the former decision held that the plaintiff was not engaged in interstate commerce. It is true the writer of the decision expressed this to be his opinion, but the remaining members of the court did not do so. They deemed this to be immaterial and expressed no opinion on the question. They were all agreed that no act of negligence had been shown. Hence, there was no liability on the part of the defendant either under the Federal or state law, and it was entirely immaterial which one was applied; for negligence is the basis of all liability under both laws, and there can be no recovery under either act in the absence of negligence on the part of the railroad company or some of its employees. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 502, 58 L. ed. 1062, 1068, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Manson v. Great Northern R. Co.* 31 N. D. 643, 649, 155 N. W. 32.

Complaint is also made of the fact that the former opinion quotes a portion of § 6107, Comp. Laws 1913. And it is asserted that this section "is a fellow servant statute, and states the fellow servant rule, which rule was expressly abrogated by the North Dakota and Federal railway statutes." Section 6107 consists of two parts. The first part embodies the doctrine of assumption of risk, and the second part the fellow servant rule. The two are entirely distinct. It is true the fellow servant rule has been abrogated by both the state and Federal statutes. But the common-law defense of assumption of risk is still open to the defendant, except in case of violation of a statute passed for the protection of employees. *Seaboard Air Line R. Co. v. Horton*, and *Manson v. Great Northern R. Co.* supra. See also chap. 207, Laws 1915.

We adhere to our former conclusion,—plaintiff has failed to establish that he was injured by reason of any act of negligence on the part of the defendant or its employees.



**CAROLINE LAURA TROTT, Leila Florence Trott, Leila S. Starr,  
Clara Jones, Kate Jones, Caroline Jones, and Bessie Jones, Re-  
spondents, v. STATE OF NORTH DAKOTA, Appellant.**

(4 A.L.R. 1372, 171 N. W. 827.)

**Taxation — effect of stipulation between parties of the action.**

1. A stipulation fairly made, relating to the conduct of a pending case, will not be set aside where such action would be likely to result in serious injury to one of the parties thereto.

**Courts — jurisdiction — procedure presumed regular.**

2. The district court is a court of general jurisdiction, and where the parties to a controversy the subject-matter of which is properly within the jurisdiction of such court voluntarily adopt a certain mode of procedure in submitting the controversy for determination, they will not thereafter be heard to say that the procedure adopted was irregular and improper.

**Treaties — treaty superior to laws or Constitution — duty of courts in upholding treaties.**

3. A treaty made under the authority of the United States and within the scope of the legitimate powers vested by the Constitution is the supreme law of the land; its provisions supersede and render nugatory all conflicting provisions in the laws or constitution of any state; and in case such conflict arises it is the duty of the judges of every state to uphold and enforce the treaty provisions.

**Treaties — inheritance tax laws — effect of conflict between laws and treaty.**

4. The treaty between the United States and Great Britain (Act March 2, 1899, 31 Stat. at L. 1939), which provides that the citizens or subjects of each of the contracting powers may dispose of their personal property within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees being citizens or subjects of the contracting portion, whether residents or nonresidents, shall succeed to their said personal property, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases, renders nugatory, as to citizens or subjects of Great Britain, the provisions of the North Dakota Inheritance Tax Law, which imposes upon nonresident aliens a larger tax than that imposed upon citizens or resident aliens; and the citizens or subjects of Great Britain are chargeable only with the same tax as that chargeable against citizens and resident aliens.

Opinion filed February 27, 1919.

From an order of the District Court of Grand Forks County, *Cooley, J.*, defendant appeals.

Affirmed.

*Wm. Langer*, Attorney General, *George K. Foster*, Assistant Attorney General, *Geo. E. Wallace* and *F. E. Packard*, for appellant.

"The plaintiffs' complaint does not show whether or not the tax was paid under protest, and where paid without protest it cannot be recovered." *Diocese v. Cass County*, 28 N. D. 209; *Lewis v. San Francisco*, 2 Cal. App. 113, 82 Pac. 1196; *Phoebus v. Manhattan Social Club*, 105 Va. 144, 8 Ann. Cas. 667; 45 Am. Dec. p. 156 and note, *Compulsion of Legal Process*; *Cooley*, Taxn. 3d ed. 1400, note 2, 1495.

"Money voluntarily paid with full knowledge of the fact and circumstances under which it is paid, although paid under a mistake of the payer's legal rights and obligations, cannot be recovered back." *Baltimore v. Lefferman*, 45 Am. Dec. 148; see also 8 Ann. Cas. 699, note and 10 Ann. Cas. 1050, note, *Comp. Laws 1913*, § 8532.

"A decision of the county court herein is a final determination of the rights of the plaintiffs and the state in the matters adjudicated." *Comp. Laws 1913*, § 6579; *Joy v. Elton*, 9 N. D. 428; *Sjoli v. Hagen*, 19 N. D. 82; *Re Rice*, 56 App. Div. 253, 61 N. Y. Supp. 911, 68 N. Y. Supp. 1157; *Re Barnum*, 129 App. Div. 418, 114 N. Y. Supp. 33.

*McIntyre & Burtness*, for respondents.

"Treaties made under the authority of the United States shall be the supreme law of the land, and the judges in each state shall be bound thereby." U. S. Const. art. 6; *Hauestein v. Lynham*, 100 U. S. 483, 490, 25 L. ed. 628, 630; *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. ed. 642, 644; *McKeown v. Brown*, 149 N. W. 593; *Re Moynihan*, 151 N. W. 504; *Re Peterson*, L.R.A.1916A, 469, 151 N. W. 66. See note in L.R.A.1916A, 474.

CHRISTIANSON, Ch. J. One Ormand Peniston, a resident of Grand Forks county in this state, died testate, October 8, 1913, and his last will and testament was duly admitted to probate in the county court of Grand Forks county on December 20, 1913. The plaintiffs herein were legatees under said will, and by the final decree there was set over to each of said plaintiffs their respective distributive shares of said estate.

The plaintiffs were and are British subjects. By an order of the county court entered on or about January 30, 1915, the county court fixed the cash value of such distributive shares and fixed the amount of inheritance tax due thereon. The tax computed against the shares of said plaintiffs was at the rate of 25 per cent. This tax was imposed under § 8977, Compiled Laws 1913, which provides: "Upon the transfer of property in any manner hereinbefore described to or for the use of collateral relations or strangers in blood who are aliens not residing in the United States, or to or for the use of any corporation which is not chartered by the authority of the government of the United States or of any state, a tax of 25 per centum shall be levied and collected." The plaintiffs paid the inheritance tax so imposed. They thereupon brought the instant action in the district court of Grand Forks county, setting up the facts above recited, alleging that they were compelled to pay and did pay the respective sums stated; and further alleging that the said Inheritance Tax Law of this state in so far as it undertakes to impose a tax of 25 per cent on inheritance by aliens, who are British subjects, is invalid and void, in that it is in conflict with the treaty between the United States and Great Britain ratified July 28, 1900, and proclaimed August 6, 1900. The state interposed a general demurrer to the complaint. The demurrer was overruled and the defendant appeals.

The order appealed from was entered October 8, 1915. The appeal was taken November 22, 1915. About the time the appeal was taken the attorneys for the plaintiffs and the then attorney general of this state entered into a stipulation "that the only question that is to be submitted for determination on the appeal in this case is the question of the validity of § 2 of the Inheritance Tax Laws, being chapter 185 of the Session Laws of 1913, in so far as the same prescribes an inheritance tax of 25 per cent on inheritances by collateral relations or strangers in blood, who are aliens not residing in the United States, in so far as the same applies to the plaintiffs who are British subjects and who reside in the Bermudas, with the exception of one who resides in British Guiana, South America; it being agreed and understood that if the said provision of the said law is valid and binding upon the plaintiffs, then recovery cannot be had in said action, but if said provisions are invalid as against said plaintiffs, recovery shall be had for the amount demanded in the complaint."

On April 16, 1918, the present attorney general applied to this court for an order relieving defendant from the stipulation. From the showing submitted upon the hearing of such application, it appears that there was considerable correspondence between the attorneys for the plaintiffs and the then attorney general before the commencement, and during the pendency, of the instant action. In a letter written July 5, 1915, the plaintiffs' attorneys called the attention of the attorney general to the provisions of the treaty, and certain decisions, and concluded with the request that the attorney general "advise as to the conclusion reached and as to whether or not you would advise the state treasurer to refund the amount paid." The attorney general replied under date, July 10, 1915, stating in part, "I have read the cases referred to in your letter as well as a few others, and I am inclined to the view that the conclusion you have reached with respect to this matter is correct. It would seem from the authorities cited that our statute is in conflict with article 2 of the treaty between the United States and Great Britain. . . . However, under the circumstances I would hardly feel justified in advising the state treasurer to refund the amount paid in your case. In other words, I would prefer that that portion of our Inheritance Tax Law be first declared unconstitutional by the courts before advising a refund." Thereupon plaintiffs' attorneys prepared the summons and complaint in the instant case and mailed the same to the attorney general, who admitted service thereon, and returned the same with a letter and a general demurrer, stating: "I have concluded to demur to the complaint in this action *merely for the purpose of determining the constitutionality of the statute involved*. I am not raising the question of proper parties plaintiff, *the purpose of the demurrer being only as stated to determine the validity of the statute*." It will be noticed that the stipulation in question is in harmony with the correspondence, and merely continued the original policy of counsel. The avowed purpose of the application to be relieved from the stipulation is to enable the defendant to raise certain procedural questions, *viz.*,—that the plaintiffs either should have appealed from the order of the county court fixing the tax, or moved for a vacation of such order.

Assuming for the sake of argument that defendant's contention as to the matter of remedy is correct, and that by being relieved from the

stipulation it might prevail in this action upon this ground, we then have this situation that the plaintiffs by reason of their reliance upon the letters of the attorney general, and the stipulation, would be deprived of all remedy. For at the time the action was commenced,—nay at the time the appeal herein was taken and the stipulation in question signed,—the plaintiffs might still have applied to the county court for a rehearing or a vacation of the order fixing the tax, and, in event of an adverse decision by the county court, appealed therefrom. But interim the signing of the stipulation and the application to be relieved therefrom, the time in which to apply to the county court for relief has expired. See *Fischer v. Dolwig*, 29 N. D. 561, 151 N. W. 431; *Reichert v. Reichert*, 41 N. D. 253, 170 N. W. 621. It is a maxim of our jurisprudence that “one must not change his purpose to the injury of another.” Comp. Laws 1913, § 7246. Also, that “he who consents to an act is not wronged by it.” Comp. Laws 1913, § 7249. And that “acquiescence in error takes away the right of objecting to it.” Comp. Laws 1913, § 7250. The power to relieve from a stipulation should be exercised to promote justice, and not to defeat it. To grant defendant's application and thereby in effect extend the scope of the demurrer and subject plaintiffs to the resulting burden, inconvenience, and possible loss, would, in our opinion, be a violation of the plainest principles of justice. See 36 Cyc. 1294, et seq. See also 3 C. J. 718, et seq.

It is true, consent of the parties cannot give jurisdiction of an action, where the subject-matter thereof is one in excess of the jurisdiction of the court. But it must be remembered that the district court is one of general jurisdiction. It has “original jurisdiction, except as otherwise provided in the Constitution, of all causes both at law and equity.” N. D. Const. § 103. Hence, it “has power to determine all controversies or questions of difference which can possibly be made the subject of civil action.” *Lobe v. Bartaschawich*, 37 N. D. 572, 164 N. W. 276. See also *Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman*, 31 N. D. 597, 154 N. W. 654. It is not denied that the district court has jurisdiction over the subject-matter and might properly decide the questions involved, provided the proper procedure had been adopted in bringing the controversy before that court. The point which defendant desires to raise is, not want of jurisdiction over the

subject-matter of controversy, but that the wrong method was adopted in bringing the same before the court for determination. But the procedure was adopted by the parties themselves. They voluntarily conferred jurisdiction upon the district court, and restricted the issues to the one question of whether the state law conflicted with the provisions of the treaty. And on this appeal they expressly stipulated that this was the only question to be submitted. So, leaving all questions as to the propriety of the procedure on one side, we are of the opinion that the defendant should not now be permitted to depart from the issue which it framed in the court below, and which it has formally stipulated to be the only one which it intended or desired to raise on this appeal.

This brings us to the merits of the appeal. As already indicated the Inheritance Tax Law of this state imposes a considerable higher tax upon aliens not residing in the United States, than upon citizens of, or aliens residing in, this country. The constitutionality of this feature of the law was sustained in *Moody v. Hagen*, 36 N. D. 471, L.R.A. 1918F, 947, 162 N. W. 704, Ann. Cas. 1918A, 933. But the plaintiffs in this case contend that the provision in question has no application to them, under the treaty existing between this nation and Great Britain. The particular treaty provision invoked reads as follows: "The citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, whether residents or nonresidents, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases." [31 Stat. at L. 1939.]

The Constitution of the United States places a treaty on the same footing with and of like obligation to an act of Congress. Both are declared by the Constitution to be the supreme law of the land. U. S. Const. art. 6; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456. A treaty made under the authority of the United States and within the scope of the legitimate powers

vested by the Constitution supersedes and renders nugatory all conflicting provisions in the laws or constitution of any state, and in case such conflict arises it is the duty of the judges of every state to uphold and enforce the treaty provisions. U. S. Const. art. 6; 4 Enc. U. S. Sup. Ct. Rep. 214.

The treaty provision quoted above is neither obscure nor ambiguous. To any reader having acquaintance with the ordinary and approved usage of our language, it suggests at once the purpose and intent of the contracting parties to eliminate and forbid all discrimination between the subjects of the contracting governments with respect to the right of inheritance of personal property, and the amount of duties or taxes which the citizens or subjects of either of the contracting governments may be required to pay upon such inheritance. In our opinion, the plaintiffs are correct in their contention that they cannot be subjected to any greater tax than if they were resident heirs. See *Re Moynihan*, 172 Iowa, 571, L.R.A.1916D, 1127, 151 N. W. 504, 154 N. W. 904. See also *McKeown v. Brown*, 167 Iowa, 489, 149 N. W. 593. The moneys exacted from the plaintiffs in excess of what the treaty required them to pay were therefore exacted in violation of the supreme law of the land. If the defendant retains this excess, it will simply be retaining money, which under the terms of the treaty belonged to the plaintiffs, and which the defendant had no right to exact from them.

It follows from what has been said that the order appealed from must be affirmed. It is so ordered.

BRONSON, J., being disqualified, did not participate.

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JOHN WACKER, Respondent, v. LENHARDT MERTZ, Appellant.

(171 N. W. 830.)

**Damages — malicious destruction of property — treble damages — actual damages.**

1. In a civil action for the malicious destruction of property under § 10,050, Comp. Laws 1913, it is proper for the jury, under proper instructions, to award treble damages in a general verdict, or the trial court may require the jury

to return a verdict upon the actual damages and a special finding upon the question of malice, and thereupon award the treble damages under the statute.

**Damages—malicious destruction of property—verdict.**

2. In such action for the malicious destruction of a threshing separator, it is held that a general verdict so rendered for treble damages is proper.

Opinion filed March 1, 1919.

Appeal from judgment for plaintiff, District Court, Sheridan County, *Nuessle, J.*

Affirmed.

*M. J. Englert and O. P. Jordal*, for appellant.

In order to recover under § 10,050, Comp. Laws 1913, it is necessary that the plaintiff show that he is the owner of the property, and such owner at the time of its destruction. Comp. Laws 1913, § 10,050; *Scott v. Trebilcock*, 21 S. D. 333, 112 N. W. 847; *Bracher v. Shelby Iron Co.* 144 Ala. 659, 40 So. 80; *Koons v. Swartz*, 47 Pa. Super. Ct. 217.

The measure of damages done to property is the market value at the time and place of the injury. In the case at bar there was no evidence of the market value. *Slattery v. Rhud*, 23 N. D. 274; *Arn v. Matthews*, 39 Kan. 272, 18 Pac. 65.

Malice is an essential ingredient of the offense of malicious mischief, and in the absence of evidence disclosing such malice the cause cannot be maintained. *State v. Miner*, 17 N. D. 454, 19 L.R.A.(N.S.) 273, 117 N. W. 528.

The jury should be instructed to find actual damages. The penalty of treble damages is a statutory punishment applied by the court to the facts as found by the jury. *Marchandy v. Haber*, 37 N. Y. Supp. 952; *Yeamans v. Nichols*, 81 N. Y. Supp. 500; *King v. Havens*, 25 Wend. 420; *Black v. Mace*, 66 Me. 49; *Withington v. Hildebrand*, 1 Mo. 280; *Loewenberg v. Rosenthal* (Or.) 22 Pac. 601; *Gonin v. Robledo*, 6 Porto Rico Fed. Rep. 451; *Scott v. Trebilcock* (S. D.) 112 N. W. 847.

*Peter Winter and J. A. Hyland*, for respondent.

It seems to be generally held that either the jury or the court may double or treble the damages in this class of cases (for malicious destruction of property). *Jensen v. R. Co.* 127 N. W. 650; *Hughes v.*



Stevens, 36 Pac. 320; Wymond v. Amsbery, 2 Colo. 213; Livingston v. Platner, 1 Cowen 175.

It is immaterial whether the jury return in their verdict the sum-recoverable under the statute, or whether they return the actual damages, and the court directs the judgment to be entered in accordance with the statute. Richards v. Sanderson, 39 Colo. 270, 89 Pac. 768; R. Co. v. Carley, 39 Ark. 246; Quinby v. Carter, 20 Me. 218.

Where treble damages are recoverable they ought to be assessed by the jury. R. Co. v. Watkins, 43 Kan. 50; Allen v. Bainbridge, 145 Mich. 366, 108 N. W. 732.

BRONSON, J. This is an action to recover treble damages under § 10,050, Comp. Laws 1913, for maliciously setting fire to the separator of the plaintiff. In the district court of Sheridan county a verdict for \$4,200 was returned for the plaintiff. From the judgment rendered thereupon the defendant appeals.

On September 4, 1915, the separator of the plaintiff, while standing in a grain field, was destroyed by fire. Shortly prior to that time, the plaintiff had purchased such machine and had used it for about eight days in threshing operations. There is evidence in the record that one John Weltz, who was in the employ of this defendant, deliberately, in company with some other men, set fire to this machine, during the evening of the said day, and that he was induced to do so by the defendant.

The complaint alleges a conspiracy, and there is evidence in the record tending to show, by direct evidence and corroborative testimony, that this employee and the defendant did conspire to burn this machine.

The appellant, under his specifications of error, contends that the evidence is insufficient to connect the defendant with the conspiracy alleged or proved, or to establish the ownership of the machine destroyed or its value, or any malice on the part of the defendant, and that the trial court erred in permitting the jury, in its general verdict rendered, to treble the damages.

We are satisfied from an investigation of the record that there is sufficient evidence to warrant and justify the finding of the jury with reference to the ownership of the property, its value, and the conspiracy of the defendant, and his malice in connection with the destruction of

the property. *State v. Minor*, 19 L.R.A.(N.S.) 273, and note (17 N. D. 454, 117 N. W. 528).

The only serious question in the record is the contention of the appellant with respect to the award of treble damages made by the jury under the instructions of the court.

In the absence of statute, the defendant, if liable, is liable for the actual damages sustained. Under the statute, § 10,050, Comp. Laws 1913, the defendant, if liable and the act was done maliciously, is liable for treble the amount of such actual damages. The question of the nature of the act, whether malicious or otherwise, was for the jury.

This question of malice being for the jury, it was either necessary for the jury to make a special finding concerning malice, in order for the court to treble the damages, or, in the absence of such special finding, to assess such treble damages upon proper instructions therefor. Under proper instructions, we see no reason why the jury may not use the multiplication table as well as the court.

Under § 10,050, Comp. Laws 1913, the trial court may, under proper instructions, submit to the jury the question of the actual damages sustained, and, if found, the question of malice, and upon determination award in a general verdict rendered treble damages, or it may require the jury to return a verdict upon the actual damages and a special finding upon the question of malice, and thereupon award the treble damages under the statute. *Richards v. Sanderson*, 39 Colo. 270, 121 Am. St. Rep. 167, 89 Pac. 769; *Jensen v. South Dakota C. R. Co.* 25 S. D. 506, 35 L.R.A.(N.S.) 1015, 127 N. W. 650, Ann. Cas. 1912C, 700; 13 Cyc. 254; *Tait v. Thomas*, 22 Minn. 537; *Memphis & L. R. R. Co. v. Carley*, 39 Ark. 246; *Quinby v. Carter*, 20 Me. 218; *Chicago, K. & W. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985.

The appellant contends that the damages shown are \$1,617.60; that three times this amount is \$4,842.80. The jury's verdict was \$4,200. Therefore, they speculated and were misled. Certainly, if there was any such speculation or being misled, it was in appellant's favor, and he has no reason to complain.

It therefore follows that the judgment should be affirmed, with costs to the respondent. It is so ordered.

**NELLIE BULLER, Respondent, v. AUGUSTA FALK and Louis Falk, Appellants.**

(171 N. W. 823.)

**Contracts — contracts for sale of land — cancelation — notice of cancelation.**

1. Under § 8120, Compiled Laws 1913, relating to the foreclosure of land contracts, which provides that notice of cancelation must be served "upon the vendee or purchaser, or his assigns," it is incumbent upon the vendor in a land contract, who has notice or knowledge of the fact that the vendee has assigned his interest in the contract, to serve notice of cancelation upon the assignee.

**Contracts — contract for sale of land — notice upon assignee of vendee required.**

2. *Held* for reasons stated in the opinion that the land contract in the instant case was not canceled by reason of the failure of the vendor to serve notice of cancelation upon the assignee of the vendee.

Opinion filed March 1, 1919.

From a judgment of the District Court of Wells County, *Coffey, J.*, defendants appeal.

Affirmed.

*J. J. Youngblood* and *B. F. Whipple*, for appellants.

A vendor is not obliged to regard an assignment in the absence of a proper notice thereof. Comp. Laws 1913, § 7405, 39 Cyc. 1676.

There is no evidence or reason why a court of equity should protect plaintiff from the effect of a statutory cancelation of the contract. *Nelson v. McCabe*, 163 N. W. 724.

The evidence does not show any tender by plaintiff nor any offer or ability to perform. *Beiseker v. Anderson*, 116 N. W. 94.

*F. F. McCue*, for respondent.

Where the party appealing does not specify that a review of the entire case is demanded, the supreme court cannot try the case *de novo*. Comp. Laws 1913, § 7846, and rule 31 of this court.

Failure to include all of the evidence offered at the trial in the statement of the case for appeal precludes the appellate court from examin-

ing the findings of fact in the trial court. *Edmondson v. White*, 8 N. D. 72; *State v. Scholfield*, 13 N. D. 664.

In order to cancel a contract for the purchase of land, notice must be served upon the assignee of the purchaser under the contract. *Williams v. Cory*, 21 N. D. 516; *Comp. Laws 1913*, § 8120.

Hay in making service acted as the agent of the owner of the land. *Comp. Laws 1913*, § 6350; *Jones v. Bumford*, 21 Iowa, 217; *Allen v. McCalla*, 25 Iowa, 464; *Hever v. Snow (Mass.)* 14 Pac. 32.

One who has subjected himself to a forfeiture by breach of contract may, by making compensation, be relieved therefrom. *Bennett v. Glaspell*, 15 N. D. 239.

CHRISTIANSON, Ch. J. On October 18, 1915, the Citizens State Bank of Sykeston entered into a written contract with one John Boss, whereby it sold and agreed to convey unto him, or his assigns, an 80 acre tract of land in Wells county, upon the performance by said Boss of his part of the agreement. Boss agreed to pay \$1,600 for the land, *viz.*, \$300 in cash, and \$1,300 on demand, with 7 per cent interest from the date of the contract. The contract also contained this stipulation: "It is agreed and understood that as soon as party of the second part puts up buildings on above-described premises that party of the first part will deliver warranty deed and take back a first mortgage for an amount said party of the first part can place on the same and a second mortgage for the balance, to be paid in five annual instalments." It is conceded that John Boss paid the \$300 cash payment stipulated in the contract. He also testifies that no demand was ever made upon him for the payment of the \$1,300, and that the cashier of the vendor bank stated that they would rather have the money continue to earn interest. The cashier, however, denied this. It is undisputed that John Boss afterwards assigned the contract to the plaintiff by written assignment dated November 1, 1916. It is also undisputed that the vendor, the Citizens State Bank of Sykeston, on November 3d, 1916, conveyed the premises to the defendant Augusta Falk by warranty deed. It is conceded that the defendant had full knowledge of the outstanding contract to John Boss. The defendant admitted that she at no time caused any demand to be made upon John Boss for the payment of the balance due on the purchase price. She did, however, institute proceedings to  
41 N. D.—40.

foreclose the contract under the provisions of §§ 8119-8122, Compiled Laws 1913. The notice of cancelation bears date November 10, 1916, and states that the cancelation and termination of the contract will take effect upon the expiration of thirty days after the service thereof. The notice is addressed to "John Boss, *and to whom it may concern.*" It was served upon John Boss on November 11, 1916. At the time of the service John Boss notified the person serving it that he was no longer interested in the matter, but had sold and assigned all his interests in the land and the contract to the plaintiff, Nellie Buller. The grounds of default specified in the notice were the failure to pay the sum of \$1,300, with 7 per cent interest from October 18, 1915; and the failure to put up buildings on the land. The notice of cancelation was served upon Boss alone. The plaintiff, Nellie Buller, was not served in any manner. On December 13, 1916, she notified the defendant Augusta Falk that she held an assignment of the contract from Boss, and that she had the money, and stood ready to pay the balance due on the contract. Some reference was also made to some alleged defect in the title which she desired to have cured. The defendant refused the offer on the ground that the contract had already been canceled. Plaintiff thereupon brought the instant action to enforce the contract. The trial court made findings and conclusions in favor of the plaintiff, and defendants appeal from the judgment entered thereon.

So far as the ultimate rights of the parties are concerned, the important and controlling question in the case is whether the contract for deed has been canceled. If it has, then of course the plaintiff has no standing whatever. But if it has not been canceled then the contract is binding upon the parties to this litigation, and the plaintiff is entitled to a conveyance of the premises upon complying with the terms of the contract.

The only default specified in the notice of cancelation worthy of notice is the one relating to the failure to pay the balance due on the purchase price. The alleged default in failing to construct buildings is, in our opinion, of no consequence. The stipulation with regard to the construction of buildings has already been set out in full. It speaks for itself. It merely provides that when such buildings are constructed the vendor will give to the vendee a warranty deed and take back certain mortgages for the balance due on the purchase price. Under the

evidence the trial court was justified in finding that no demand was ever made either upon Boss or the plaintiff for the balance due upon the purchase price, and that the vendor did in fact state to the vendee that there was no use to pay the money "before five years." The defendant asserts that the service of the notice of cancelation was a demand for payment. This is probably true. But it is also true that, when the notice was served, Boss informed the agent of the defendant who served the notice that he (Boss) was no longer interested in the matter, but that he had assigned his contract to the plaintiff.

Under the statute relating to the foreclosure of land contracts, notice of cancelation thereof must be served "upon the vendee or purchaser, or his assigns." Comp. Laws 1913, § 8120. The word "assigns" as used in the statute includes an assignee of the purchaser. *Williams v. Corey*, 21 N. D. 509, 31 N. W. 457, Ann. Cas. 1913B, 731. And where the vendor has knowledge or notice of the fact that the vendee in a land contract has assigned his interest therein to some other person, it is incumbent upon the vendor to serve notice of cancelation upon such other person. *Ibid*.

It will be noticed that the notice of cancelation in the case at bar was addressed "to John Boss and to whom it may concern." The very form of the notice indicates that the defendant supposed that someone besides Boss was, or might be, interested in the matter. When the notice was served on Boss he informed the agent of the defendant who served it that the plaintiff was his assignee and as such properly entitled to be served with notice, and yet no such service was made. We do not believe that under these circumstances the defendant is in a position to insist that the contract has been canceled. At all events the decision of the trial court is just. The defendant Augusta Falk will receive the full amount of the purchase price and interest stipulated for in the contract. We are of the opinion that the judgment should be affirmed, with the further provision that the plaintiff shall pay to the defendant Augusta Falk any taxes which she may have paid upon the premises, with legal interest thereon. Neither party will recover costs on this appeal.

**BRIOSCHI-MINUTI COMPANY, a Corporation, Appellant, v.  
ELSON-WILLIAMS CONSTRUCTION COMPANY, a Corporation,  
and Dakota Trust Company, a Corporation, Defendants.**

(172 N. W. 239.)

**Corporations — foreign corporations — compliance with state laws.**

1. In an action upon a contract by a foreign corporation which has not complied with the statute, § 5238, Compiled Laws 1913, imposing conditions precedent to the right to do business in this state, the noncompliance of such corporation with the statute is a matter of defense to be alleged and proved by the defendant, unless the complaint clearly shows a violation of the statute.

**Corporations — foreign corporations — doing business in state.**

2. The transaction or doing of business in this state within the inhibition of the statute does not cover a single business transaction or an isolated transaction, following State use of Hart-Parr Co. v. Robb-Lawrence Co. 15 N. D. 55.

**Corporations — foreign corporations — what constitutes doing business in state — pleading.**

3. Where, in such action, the complaint alleges the furnishing of labor and material for ornamental plaster work in the construction of county buildings and necessarily the performance of some of the work and the furnishing of some of the material in this state, it is *held* that such allegations do not necessarily aver a transaction or doing of business in this state contrary to the statute.

**Corporations — foreign corporations — doing business in state — what answer must allege.**

4. Where, in such action, the answer does not allege affirmatively that the plaintiff has transacted or done business in this state contrary to the statute, it is insufficient to establish the defense of noncompliance with the statute.

**Principal and surety — release of surety.**

5. In such action a defendant surety, to avail itself of the defense of exoneration under § 6683, Compiled Laws 1913, requiring a creditor to proceed against the principal upon the requirement of the surety, must allege in its answer a reasonable notice and demand to proceed against the principal and prejudice resulting to the surety by reason of the failure of the creditor so to do.

**Counties — surety bonds.**

6. Where a statutory contractor's bond is furnished under the provisions of § 6832, Compiled Laws 1913, a direct obligation exists in favor of those who furnish labor or material, for whose benefit such bond is given, and a surety thereon cannot be released or exonerated from this obligation through an

assignment of the principal contract, a change in its terms, the default of the principal contractor, or an improper payment of moneys due thereunder, even though made without the knowledge or consent of the surety, where the obligee therein who has furnished labor or material pursuant to the original contract has not participated in such changes, had knowledge thereof, nor consented thereto.

**Principal and surety** — in order to be exonerated from bond the surety must allege that the obligee participated or consented to the change in bond.

7. *Held* that the defenses of the surety company alleging in separate defenses the assignment of the principal contract, changes in its terms, improper payments to the contractor, and defaults of the contractor, made with the knowledge and consent of the county and the principal contractor, and without the knowledge and consent of the surety, are insufficient to establish a defense of exoneration of the surety upon its obligation to the plaintiff, an obligee in the statutory bond furnished by the surety, in the absence of an allegation that obligee participated therein or consented thereto.

Opinion filed March 6, 1919.

**Appeal on subcontract and surety bond for labor and material.**

Appeal from order of District Court, Divide County, *Leighton, J.*, overruling demurrers to answer of defendant Trust Company.

Reversed.

*B. H. Schriber* and *F. A. Leonard*, for appellant.

The rule requiring pleadings to be liberally construed applies to allegations which are made and are ambiguous and defective, and has no reference to the omission of material averments. *McCormick Harvesting Mach. Co. v. Rae*, 9 N. D. 482; 31 Cyc. p. 86, § 8.

The term "transacting or doing business" as used in laws of this character (N. D. Comp. Laws 1913 § 5242) implies continuity, and does not mean a single isolated transaction done within the borders of the state without any purpose of engaging generally in the carrying on of its business here. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Florsheim v. Lester* (Ark.) 29 S. W. 34; *Col. Iron Works v. Min. Co.* 15 Colo. 499; *Mearshon v. Lumber Co.* 187 Pa. 12; *Bank v. Sherman*, 28 Or. 573; *D. & H. Canal Co. v. Malenbrock*, 23 N. J. L. 281; *Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 57; *Sucker State Drill Co. v. Wirdz Bros.* 17 N. D. 313; *York Mfg. Co. v. Colley*, 38 Sup. Ct. Rep. 430.

The principal debtor is a resident of Minnesota, and the surety has no right under the statute to require the creditor to go into a foreign



jurisdiction to pursue the principal debtor. *Bostwick v. First Nat. Bank*, 6 Ohio C. C. Dec. 683; *Row v. Bechtel*, 13 Ind. 381; *Whittlesey v. Heberer*, 48 Ind. 260; *Conklin v. Conklin*, 54 Ind. 289.

The surety has no right to require the creditor to proceed against the principal, or pursue any remedy which the surety could not pursue himself. *Yerxa v. Ruthruff*, 19 N. D. 13; *Taylor v. Beck*, 13 Ill. 376; *Rodgers v. Detroit Sav. Bank*, 18 L.R.A.(N.S.) 560.

In the construction of the contract of a surety or guarantor, as well as every other contract, the true question is, What was the intention of the parties as disclosed by the instrument read in the light of surrounding circumstances? *Northern Light Lodge v. Kennedy*, 7 N. D. 150; 9 C. J. p. 858, § 197, note 10 and cases there cited.

Immaterial changes which do not alter the general character of the work contemplated by the contract, or the general character of the materials, do not affect the sureties' liabilities on the bond. 9 C. J. p. 858, 197 note 10 and cases there cited; *Equitable Surety Co. v. McMillan*, 234 U. S. 448, 457, 458; *Standard Asphalt & Rubber Co. v. Texas Bldg. Co.* 99 Kan. 567, L.R.A.1917C, 490, 162 Pac. 299.

*Lawrence & Murphy*, for respondents.

Where a bond has been given by a contractor for the faithful performance of a contract, and the same is altered by ordering changes which materially increased the cost of the building, the surety is released. *Northern Light Lodge v. Kennedy*, 7 N. D. 147; *Miller v. Stewart*, 9 Wheat. 703; *Tomlinson v. Simpson*, 33 Minn. 446, 23 N. W. 864; *Birkhead v. Brown*, 5 Hill, 634; *Simonson v. Thori* (Minn.) 31 N. W. 862.

A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty. Comp. Laws 1913, § 6677; *Stearns, Suretyship*, pp. 99, 109, 2d ed. pp. 110, 113; *Friendly v. National Surety Co.* 10 L.R.A.(N.S.) 1161; *Backhouse v. Hall*, 6 Best & S. 507; *Dupee v. Blake* (Ill.) 35 N. E. 867; 2 *Bates, Partn.* §§ 648-655; *Birch v. De Rivera*, 6 N. Y. Supp. 206. See also *Penoyer v. Watson*, 16 Johns. 100; *Crance Co. v. Specht* (Neb.) 57 N. W. 1015; *Gaslight v. Ely*, 39 Barb. 174; *Machine Co. v. Hines* (Mich.) 28 N. W. 157; *Barnett v. Smith*, 17 Ill. 565; 24 *Am. & Eng. Enc. Law*, 764, 765.

BRONSON, J. On March 15, 1917, the Elson-Williams Construction Company, a Minnesota corporation, made a contract for the construction of a courthouse in Divide county. On March 31, 1917, this construction company, and the defendant trust company as surety, executed a statutory bond pursuant to § 6832, Compiled Laws of 1913, for the performance of such contract and the payment of all claims and demands for labor and material to be furnished thereunder. On May 9, 1917, the plaintiff, a Minnesota corporation, made a contract with this construction company to furnish all labor and material necessary to make models, casts, and erect all the ornamental plaster of every nature and description, as required by the plans and specifications for the buildings to be constructed. This action is brought on the subcontract so made and upon the statutory bond given for the balance due the plaintiff, against both the construction company and the trust company. The complaint sets forth a copy of the subcontract and the bond given, and alleges that, pursuant to such contract, it has furnished the material and labor required. That the material has been actually incorporated in the buildings, with the consent and approval of the board of county commissioners of Divide county, and that the buildings have been accepted as complete by the architects for Divide county. The defendant trust company interposed an answer alleging six separate defenses, to which the plaintiff demurred. In the trial court, the demurrer was overruled as to five defenses and sustained as to the sixth defense. From the order of the district court so overruling the demurrer, this appeal is prosecuted.

The consideration of this court, accordingly, is addressed to the sufficiency of these five separate defenses, as a matter of law, and they will be considered seriatim.

1. The first defense alleges that the plaintiff, a foreign corporation, has not complied with the laws of this state relative to foreign corporations (Comp. Laws 1913, § 5238); that it is not authorized to transact any business in this state, and that, if any contract has been made in its behalf, the same is under the laws of this state and void, under § 5242, Comp. Laws 1913, and that therefore the plaintiff is barred and estopped from maintaining this action.

Section 5238, Compiled Laws of 1913 (as amended by chap. 96 of the Laws of 1915), as far as material herein, provides as follows:

"No foreign corporation, association, or joint stock company, . . . shall sell or otherwise dispose of its capital stock or transact any business within this state . . . until such corporation shall have filed in the office of the secretary of state a copy of its articles of incorporation . . . together with a certificate, etc."

The plaintiff contends that this defense does not allege that the plaintiff has transacted or done business in this state contrary to the statute; also, that in any event the pleadings present no other issue than the performance of a single or isolated transaction within the state which is not subject to the inhibitions of the statute.

The defendant contends that it appears upon the face of the pleadings that the plaintiff was transacting business within the state without compliance with and contrary to the statute.

In the subcontract, made a part of the complaint, the plaintiff agreed to furnish all material and perform all work for the county buildings, at Crosby, North Dakota, in accordance with the general conditions of the principal contract, and the drawings and specifications therefor,—all of which are made a part of the subcontract. In § 2 of such subcontract, it is further provided:

"The subcontractor and the contractor agree that the material to be furnished by the subcontractor, are all the labor and material necessary to make the models' cast and erect all the ornamental plaster of every nature and description, including all the ornamental plaster, which is to be run or cast on the job as well as that which is to be cast in the factory and erected on the job."

In § 3 thereof, the plaintiff further agreed to complete the several portions thereof and the whole of the work so sublet by November 15, 1917, and to proceed with the erection and installation of the work comprehended in such manner as to co-operate with the plain plastering contractor and the general contractor.

These provisions of the contract, made a part of the complaint, undoubtedly show that the plaintiff agreed to furnish some materials and to perform some labor in North Dakota.

Whether these provisions, however, affirmatively allege a "transaction of business" in this state is another question.

It has heretofore been held by this court that the burden is not on a foreign corporation to either prove compliance with the statute, or that

it was not doing business in this state contrary to the statute; that the presumption is in favor of their right to do business; that he who asserts that there is illegality in the transaction, fair on its face, must plead and prove it. That if the illegality of the contract sued on or the absence of the right to sue does not appear on the face of the complaint, the facts showing the illegality or absence of right to sue must be pleaded as a defense. State use of *Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55, 60, 106 N. W. 406; *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798.

The statute involved must be considered in connection with the constitutional provisions and other cognate statutory provisions.

Section 136 of the Constitution provides that no foreign corporation shall do business in the state without having one or more places of business and an authorized agent or agents in the same, upon whom process may be served.

Section 5240, Compiled Laws 1913, requires foreign corporations, subject to the provisions of § 5238, to appoint the secretary of state its attorney upon whom process may be served, and § 5242, Compiled Laws of 1913, provides that contracts made without compliance with § 5238, Compiled Laws 1913, shall be void on the behalf of the offending corporation or its assigns.

Concerning these matters, this court, in State use of *Hart-Parr Co. v. Robb-Lawrence Co.* supra, stated: "In view of this constitutional provision it is clear that compliance only with the statutory provisions above referred to would be of no avail in this state, unless it also had one or more places of business within the state as required by the Constitution. The legislature could not waive a condition which the Constitution imposed. The statute and the Constitution must therefore be read together, and the former must be construed as supplementary to the latter. Both the statutory and the constitutional prohibitions relate to the same class of foreign corporations, viz., those 'doing business' in this state. The statute imposes additional conditions to those imposed by the Constitution, and specifically declares what shall be the consequences of a violation of the statutory and constitutional prohibition. These prohibitions apply only to those foreign corporations which do business in the state. What is meant by 'doing business' or 'transacting business?' . . . The fact that foreign corporations proposing to do

business here are required to establish a place of business within the state makes it clear that the term 'doing business' does not mean a single 'isolated transaction.' It is not reasonable to suppose that the Constitution or the statute intended that a foreign corporation, without intending a continuance of its business in the state, could not collect a debt or make any contract, or demand that its property rights should be respected, unless it had previously acquired a situs or domicile within our borders. The object of laws of this character is to require foreign corporations which undertake to carry on their business generally in this state, to establish a domicile or situs here so that they shall, like domestic corporations, be within reach of the process of our courts. The term 'transacting or doing business' as used in laws of this character implies continuity, and does not mean a single isolated transaction done within the borders of the state without any purpose of engaging generally in the carrying on of its business here." See also *Sucker State Drill Co. v. Wirtz Bros.* 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57.

The defendant, under a general denial of the allegations of plaintiff's complaint, put in issue the subcontract, and the labor and material furnished thereunder. The defendant does not specifically allege that the plaintiff has done or transacted business in this state. The complaint, in this regard, cannot be construed to affirmatively allege a transaction or doing of business in this state contrary to the statute. Without intimating whether the proof under the broad allegations of the complaint will bring the plaintiff within the inhibition of the statute, we are clearly of the opinion, following the authorities above quoted, that the issue of the noncompliance of the plaintiff with the statute in question is not presented upon the pleadings, and that therefore the demurrer as to the first defense should have been sustained.

2. The second defense is that the trust company notified the plaintiff that it should proceed against the principal, the construction company, and that unless it so did, the trust company would consider itself exonerated under § 6683, Compiled Laws 1913, and that the plaintiff had failed to so proceed against such principal, whereby the trust company was released and exonerated on its bond.

Section 6683, Compiled Laws of 1913, provides: "A surety may

require his creditors to proceed against the principal or to pursue any other remedy in his power, which the surety cannot himself pursue and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

This defense is deemed without merit. The complaint sets forth a cause of action upon a statutory bond, signed by the construction company as principal and the trust company as surety. Upon this bond both of the defendants are primarily liable. 32 Cyc. 20; Northern State Bank v. Bellamy, 19 N. D. 513, 31 L.R.A.(N.S.) 149, 125 N. W. 888; Yerxa v. Ruthruff, 19 N. D. 16, 25 L.R.A.(N.S.) 139, 120 N. W. 758, Ann. Cas. 1912D, 809. Both of the defendants have been sued in this action upon this bond. The plaintiff clearly had the right to so institute action. Compiled Laws 1913, §§ 5767 and 5768; Northern Trust Co. v. First Nat. Bank, 25 N. D. 81, 140 N. W. 705. The defendant contends that it relied upon the express provisions of the statute, § 6685. To do so, it must clearly set forth allegations which cause such statute to operate. The statute, in effect, is a declaration of the rule in equity for the exoneration of a surety. 32 Cyc. 234; Schroepfel v. Shaw, 5 Barb. 580, 592; Story, Eq. Jur. 13th ed. §§ 324, 325.

Its intent is to provide for an exoneration, to the extent only that a surety has been prejudiced where a seasonable notice and demand has been made to proceed against the principal upon the obligations, and the failure to so do has prejudiced the surety. This notice and demand must be specific and definite. Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Bailey Loan Co. v. Seward, 9 S. D. 326, 69 N. W. 58; Fulton v. Matthews, 15 Johns. 435, 8 Am. Dec. 261. The allegations of the defendant concerning notice and demand are neither specific nor definite; they do not even allege a notice and demand prior to the institution of this action. The allegations of this defense do not admit a bond to exist; they specify no particular proceedings that should have been commenced prior to the commencement of this action. They set forth no resulting prejudice. The trial court should have sustained the demurrer interposed to such alleged defense.

3. The third defense is that the board of county commissioners of Divide county and the construction company made alterations and

changes in the terms and conditions of the original contract, and in the work and labor to be performed and the compensation to be received, without the knowledge and consent of the trust company, whereby it is discharged and exonerated from liability.

The complaint is based upon the original contract as made and the statutory bond given therefor, and upon the labor and material furnished under a subcontract pursuant to the terms of the original contract.

There is no allegation in this defense that the plaintiff knew or consented to any change, amendment, or alteration of the original contract, or that any of the material or labor furnished under the subcontract was so furnished pursuant to the amended or altered original contract.

Under § 6832, Compiled Laws 1913, the statutory bond given herein stands as security for all claims and demands on account of labor and material furnished in and about the performance of the contract involved, and any person having a lawful claim against the contractor for labor and material so furnished may sue in his own name and recover in his own name the same as though the bond were made payable to him.

The bond is made for the benefit of such person. In effect, such person is an obligee therein. In effect such bond contains an agreement to pay such person for the labor or material furnished in the governmental contract. *Griffith v. Rundle*, 23 Wash. 453, 55 L.R.A. 381, 63 Pac. 199; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Kaufmann v. Cooper*, 46 Neb. 649, 65 N. W. 796; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806. See notes in 27 L.R.A. (N.S.) 573; L.R.A. 1915A, 768.

It is well settled that changes or alterations made in a contract without the knowledge, participation, or consent of the obligee or creditor, do not discharge or exonerate the surety. 32 Cyc. 178; 21 R. C. L. p. 1016.

Furthermore, in bonds of this character containing, in a sense, a public obligation, the surety is charged with notice that third persons may and will rely upon the same and that the state, the nominal obligee, is a mere trustee incapable of bartering away for its benefit and convenience the rights of the beneficiaries. 21 R. C. L. p. 1016.

Hence, the rule is stated that "changes in a contract for the perform-

ance of a public work, though not contemplated in such contract and made without the knowledge and consent of the surety on the contractor's bond, do not release the surety from his obligation under such bond to pay promptly all persons supplying the contractor with labor and material for the prosecution of the work, at least so far as their labor and materials are supplied in accordance with the original contract." 21 R. C. L. p. 1016. *Equitable Surety Co. v. McMillan*, 234 U. S. 448, 58 L. ed. 1394, 34 Sup. Ct. Rep. 803; See *United States Fidelity & G. Co. v. Golden Pressed Brick Co.* (*United States Fidelity & G. Co. v. United States*) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142.

Accordingly it has been held that changes made by a contractor and the board of county commissioners in the course of the erection of a county building, without the consent of the laborers or materialmen employed therein, will not deprive the latter of their right of action on the bond given therefor. *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Dewey v. State*, 91 Ind. 173; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Standard Asphalt & Rubber Co. v. Texas Bldg. Co.* 99 Kan. 567, L.R.A.1917C, 490, 162 Pac. 299.

This holding does not obligate the surety beyond the express terms of its contract, or permit the defendant to avail itself of the provisions of § 6668, Compiled Laws 1913.

Under these principles, the defense alleged is insufficient and the demurrer should have been sustained. It is so ordered.

4. The fourth defense is that the construction company and the board of county commissioners of Divide county, without the knowledge or consent of the trust company, and contrary to the terms of the principal contract, assigned such contract to another construction company on or about August 7, 1917, and that after that time the original construction company, the principal in the bond, was not a party to the contract and did not perform the work for which the plaintiff claims to have furnished the labor and material, and, further, that on said August 7, 1917, there were ample funds in hands of the county, retained under the terms of the contract, with which to pay the plaintiff for its demands.

Under the principles of law which apply peculiarly to statutory bonds made for the benefit of materialmen and laborers as heretofore stated, it is clearly evident that the authorities and principles of law



cited by the trust company to the effect that any change or substitution of the original contracting parties releases the surety do not apply in the case at bar.

Under these principles of law heretofore stated, if the plaintiff furnished labor and material pursuant to the terms of the original contract and pursuant to the subcontract as made, the obligation of the surety, the trust company on the bond given, is not discharged by a change of the original parties, or by an assignment of the original contract, made without the knowledge or consent of the plaintiff. Otherwise, a default in the principal contractor, occurring during the course of the work, a failure to perform, a substitution of another principal contractor, voluntary or involuntary, in order to secure the completion of the project, would render every such statutory bond nugatory even though the materialman had bona fide performed his part of the contract, and would obviate the very purposes for which such statutory bond was prescribed.

The statute creating a direct obligation between surety and the materialman or laborer, at the time of the acceptance of the bond, the surety, to exonerate this obligation, must both allege and prove the act or participation of such obligee which in law will occasion a release or discharge.

This defense alleges neither notice, knowledge, nor acquiescence of the plaintiff in the alleged assignment. It alleges no change in the subcontract, the parties thereto, or in the work or labor furnished or to be furnished thereunder.

In *Kaufmann v. Cooper*, 46 Neb. 649, 65 N. W. 796, where a statutory bond was issued for the erection of an industrial home, and where, in an action upon the bond given by a materialman, the surety urged that the bond was discharged by the assignment of the principal contract from one partnership to another, the material having been furnished to the second partnership, it was held, following the principles hereinbefore stated, that the bond was not released. See also *Freeman v. Berkey*, 45 Minn. 438, 48 N. W. 194; *Abbott v. Morrisette*, 46 Minn. 10, 48 N. W. 416; *Griffith v. Rundle*, 23 Wash. 453, 55 L.R.A.381, 63 Pac. 199.

The alleged defense of moneys in the hands of the county sufficient

to pay the demands of the plaintiff does not operate to release the obligation of the surety.

It therefore follows that this alleged defense is insufficient. The demurrer is sustained.

5. The fifth defense alleged in substance that the construction company, in form a corporation, was, in fact, a contracting business wholly managed by one Williams and one Elson. That the bond in question was made upon the reliance that the work and material to be furnished under the contract would be under the control and supervision of said Williams and Elson,—all of which the board of county commissioners well knew. That on or about August 7, 1917, without the knowledge or consent of the trust company, the county assigned the contract to the Wilbur S. Williams Construction Company, to dispense with the services of said Elson, and that for a period of about sixty days thereafter the major portion of the construction work was performed under the direction of said Williams. That the said Williams and his company converted to his own use moneys and payments made to said Williams Construction Company, and neglected and refused to pay for labor and materials furnished, and finally became in default under the terms and conditions of the contract, and abandoned the same on or about November 15, 1917,—all with the knowledge of the county and without the consent or knowledge of the trust company. That no notice of default was served on the trust company, and, without permitting it so to do, allowed other persons to complete the work upon the construction.

Following the principles of law heretofore stated, it is obvious that this defense likewise is without merit. The questions of law that might arise upon an abandoned project are not presented. It is neither alleged nor claimed that the plaintiff did not furnish the labor and material in the construction completed. The question of the right of the plaintiff to recover on its contract and the bond involved, in the event that it had been prevented from fulfilling the same or a part thereof, by the abandonment of the project, is therefore not involved.

In contract work of this character two bonds are furnished by the contractor,—one for the county as real obligee, under § 3296, Compiled Laws 1913, and the other, the bond herein required under § 6832, Compiled Laws 1913.

This defense may be sufficient upon the former bond. It is wholly insufficient upon the latter. There is no averment in this defense of participation, notice, knowledge, or consent of the plaintiff in such allegations. Such allegations, if true, do not in any manner increase the express terms of the trust company's obligation in its bond to and for the plaintiff; they do not exonerate the obligation assumed in the bond to the plaintiff. See authorities cited *supra*; also *School Dist. ex rel. Koken Iron Works v. Livers*, 147 Mo. 580, 49 S. W. 507; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550.

The demurrer, accordingly, to this defense, should have been sustained.

It is therefore ordered that the demurrer of the plaintiff to the five alleged defenses herein be sustained, with costs to the appellant.

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MYLES HENDERSON, O. M. Hector, Halfdan Hanson, Ed. J. Halpin, Tom Hector, and Emil Hector, Respondents, v. LONG CREEK SCHOOL DISTRICT NO. 2 OF DIVIDE COUNTY, NORTH DAKOTA, a Municipal Corporation, and Erick Knutson, Louis Miller, and O. M. Hector, as the School Board of Long Creek School District No. 2, Appellants.

(171 N. W. 825.)

**Schools and school districts—necessity of voters passing on building or improvements of school houses—effect of adverse vote.**

1. In an action to recover for labor and materials furnished, the complaint alleged that the plaintiffs erected a schoolhouse which was needed for the accommodation of the school children of the defendant district; and that such action was taken by plaintiffs following an adverse vote at two separate elections on the proposition of bonding the district for the purpose of erecting a schoolhouse to take the place of a building which had been condemned by the board of health; *held*, that the complaint does not state a cause of action.

**Schools and school districts—§ 1184, Compiled Laws 1913, construed.**

2. Section 1184 of the Compiled Laws of 1913 authorizes boards of directors

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**NOTE.**—On personal liability to public of school officers who pay out money in excess of debt limit, see note in L.R.A.1917D, 519.

of common school districts to erect schoolhouses only when directed to do so by a majority of the voters of the district.

**Schools and school districts — powers of school directors — authority must come from voters — district not liable when expenditure not properly authorized.**

3. Where a statute limits the powers of boards of directors of common school districts as to the erection of schoolhouses, and prescribes that such powers can only be exercised by first procuring authority from the voters, and where such board, not having obtained the requisite authority, refused to enter into a contract for the construction of a schoolhouse, the district is not rendered liable as upon contract by the acceptance of a building so constructed without authority.

Opinion filed March 6, 1919.

Appeal from District Court, Divide County, *K. E. Leighton, J.*  
Reversed.

*Fisk & Murphy*, for appellants.

The school boards have only such powers as are granted by statute. Comp. Laws 1913, § 1174; *Kretchmar v. School Board*, 34 N. D. 403; *Capital Bank v. School Dist.* 6 N. D. 288, 42 N. W. 774; *Farmers & M. Bank v. School Dist.* 6 N. D. 255, 42 N. W. 767; 35 Cyc. 849, 925; *State ex rel. Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243.

Ratification presupposes the power in the board to make the original contract, and that body having no such power, there is no question here of ratification. *Engstad v. Dinnie*, 8 N. D. 1; *Storey v. Murphy*, 9 N. D. 115; *Roberts v. Fargo*, 10 N. D. 230.

*Geo. P. Homnes*, for respondents.

The school district could authorize the building of the schoolhouse, and it could ratify what it could authorize. *McGillivray v. Joint School Dist.* 112 Wis. 358, 58 L.R.A. 100, and cases there cited. *Mills v. Gleason*, 11 Wis. 470; *Kane v. School Dist.* 52 Wis. 502, 9 N. W. 459; *Nevil v. Clifford*, 63 Wis. 435, 24 N. W. 65; *Koch v. Milwaukee*, 89 Wis. 220, 62 N. W. 918; *Carbon County School Dist. v. Western Tube Co.* 13 Wyo. 304, 80 Pac. 155; 35 Cyc. 973.

A municipal corporation may be held for benefits received although the contract through which the benefits were received is void. *Livingston v. School Dist.* 76 N. W. 301; *People's Bank v. School Dist.* 3 N. D. 496, 67 N. W. 787; 35 Cyc. 926.

41 N. D.—41.

A school district may become bound by an implied contract where it received and retains money and property. *Kenmare School Dist. v. Cole*, 36 N. D. 32, 161 N. W. 542; *Davis v. School Dist.* 45 N. W. 989; 35 Cyc. 962, 963, 964; *Brown County School Dist. v. Sullivan*, 48 Kan. 624, 29 Pac. 1141; *Board of Education v. Carolan*, 182 Ill. 119, 55 N. E. 58; *Nichols v. Pierce County School Dist.* 39 Wash. 137, 81 Pac. 325; *Clark School Twp. v. Home Ins. Co.* 20 Ind. App. 543, 51 N. E. 107; *Fisher v. Attleborough School Dist.* 4 Cush. 494; *Springfield Furniture Co. v. Faulkner County School Dist.* 67 Ark. 236, 54 S. W. 217; *Richards v. Jackson School Twp.* 132 Iowa, 612, 109 N. W. 1093; *Andrews v. School Dist.* 37 Minn. 96, 33 N. W. 217; *Keyser v. Sumapee Dist.* 35 N. H. 477.

**BIRDZELL, J.** This is an appeal from an order entered in the district court of Divide county overruling a demurrer to the complaint. The complaint purports to allege a cause of action for the reasonable value of materials and labor supplied by the plaintiffs in erecting a schoolhouse in the defendant district under circumstances alleged in the complaint. Aside from the formal allegations of the corporate character of the district defendant, and of the official relation of the individual defendants, as members of the board of the defendant school district, the complaint alleges that the plaintiffs are residents, taxpayers and electors of the defendant district, and that each of them has children of school age attending school therein. That there are three schoolhouses situated in the defendant district; that the plaintiffs reside in territory adjacent to one of said schoolhouses in which there are not less than twenty-three children of school age attending; that prior to the school year 1916-17, the schoolhouse was in a bad state of repair, and so poorly lighted, heated, and ventilated as to be a menace to the health of the children in attendance, and an unfit place in which to hold school. That in June, 1916, complaint of the condition of the building was made to the county board of health; that the county board of health upon investigation condemned it and ordered its use as a schoolhouse to be discontinued. That in July, 1916, an election was held at which the proposition of bonding the district for the purpose of erecting and building a schoolhouse was submitted and defeated, which election was followed by two successive elections with similar results.

That the school board of said district refused to build a schoolhouse without the sanction of the voters, a majority of whom reside in the vicinity of and patronize the other schools in the district. That as the time approached for the beginning of the term of school, the schoolhouse had not been repaired, and no orders had been made for its repair, nor any provision made for a school for the pupils adjacent to the schoolhouse in question; that by reason of this condition and for the best interests of themselves and the school district, the plaintiffs did undertake to and did build and erect a schoolhouse on said site, furnishing all the material necessary therefor, except that all the material of said old schoolhouse was carefully conserved and used in the new, and furnishing and employing all of the labor necessary and requisite for building, erecting, and completing said schoolhouse; also that they furnished the necessary equipment of furniture and fixtures for properly heating, lighting, and ventilating the same; that said schoolhouse was so built and erected in accordance with the plans and specifications prepared therefor and submitted to and approved by the county superintendent of schools of Divide county in accordance with the laws made and provided. It is further alleged that it was the duty of the defendant school district to provide a proper and adequate schoolhouse, and that there was no reason for the voters to refuse to vote bonds; that the district was solvent and financially able to provide a schoolhouse; that the plaintiffs felt it to be their moral duty to provide an adequate schoolhouse. That the total cost of the same was \$2,228.88. It is also alleged that the defendants did not oppose the building and equipment of the school by plaintiffs, but, on the contrary, they accepted the schoolhouse and adopted it, and immediately occupied the same.

The sole question for consideration is the legal sufficiency of the complaint. It is of course clear that the complaint does not state a cause of action upon an express contract for the building of the school. If any cause of action is alleged, it is upon a contract which the law would imply upon these circumstances. It is elementary that a school board has only such authority as the statute confers upon it. The authority to build a schoolhouse in a common school district can only be conferred by the voters of the district. Section 1184, Compiled Laws 1913, provides that "whenever in the judgment of the board it is desirable or necessary to the welfare of the schools in the district, or to pro-

vide for the children therein proper school privileges or whenever petitioned to do so by one third of the voters of the district, the board shall call an election of the voters in the district at some convenient time and place fixed by the board, to vote upon the question . . . of the erection, . . . of a schoolhouse."

It will be noticed that the duty of the board to call an election is mandatory and that the statute gives the board no authority to proceed in case of an adverse vote; nor is any such authority conferred upon the minority of the voters. This statute is clearly a limitation upon the powers of the board and, without first procuring authority from the voters in the manner provided by statute, it would be impossible for the board of directors to enter into a contract that would bind the district. See 35 Cyc. 925. It follows necessarily from this limitation upon the power to contract expressly that the same limitation is applicable to the power to bind the district by an implied contract. The board cannot by subsequent ratification bind the district to an obligation that they are precluded from contracting in advance, except upon prescribed conditions. Otherwise those conditions could be obviated in every case by the simple expedient of a ratification, and the statute would thereby be circumvented and rendered nugatory. If the result is deemed unfortunate in a particular case it is so by reason of the statute, and the courts have no power to amend it. That a ratification cannot be made the basis of a liability greater than can be expressly contracted in advance, see *Capital Bank v. School Dist. 1* N. D. 479, 48 N. W. 363.

This case is clearly distinguishable from the case principally relied upon by the respondents,—*Kenmare School Dist. v. Cole*, 36 N. D. 32, L.R.A.1917D, 516, 161 N. W. 542, where it was held that a school district could not recover from its officers money expended by them in liquidating a contract in excess of the debt limit, it appearing that the money expended had been paid for a building which was used by the district in performance of its legal functions. In fact counsel does not contend that the case is in all respects parallel. Neither is the case parallel with that of *Eastgate v. Osage School Dist.* ante, 518, 171 N. W. 96, recently decided by this court, where quasi contractual liability was predicated upon the plaintiff's performance of a statutory duty owing to the plaintiff himself, and where evidence was offered tending

to show that the district had adopted a legal measure for determining this obligation.

We are of the opinion that the complaint does not state a cause of action, and that the demurrer should have been sustained.

Order reversed.

CHRISTIANSON, Ch. J. (concurring specially.) I concur fully in the opinion prepared by Mr. Justice BIRDZELL. The principles announced therein are in accord with the views which I advanced in my dissenting opinion in *Eastgate v. Osage School Dist.* ante, 518, 171 N. W. 96.

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JOSEPH B. FLEMING, Respondent, v. C. E. WILLIAMS, Appellant.

(171 N. W. 824.)

**Judgment — default judgment — motion to vacate — affidavits of merit.**

This is a motion to vacate a default judgment. The moving affidavits fail to excuse the default and the proposed answer fails to show any defense.

Opinion filed March 10, 1919.

Appeal from the District Court of Grand Forks County, Honorable Chas. M. Cooley, Judge.

Affirmed.

*Bronson & Coghlan*, for appellant.

"The affidavit of merits and verified proposal answer are clearly within the rule of this court's requirements as to opening defaults." *Wheeler v. Gaster*, 11 N. D. 347; *Bismarck Grocery Co. v. Yeager*, 25 N. D. 547; *Getchell v. Great Northern N. Y. Co.* 24 N. D. 487; *Sargent v. Kindred*, 5 N. D. 8.

*Samuel J. Radcliffe*, for respondent.

"The showing made by defendant and appellant does not entitle him to have the default opened." *Bazal v. St. Stanislaus Church*, 21 N. D. 602; *Ramey v. Smith*, 106 Pac. 160; *Thomas Mfg. Co. v. Erlandson*,



32 N. D. 144; State Bank v. O'Laughlin, 37 N. D. 532; Rooker v. Bruce (Ind.) 85 N. E. 351; Johannes v. Coghlan, 23 N. D. 588.

ROBINSON, J. This is an appeal from a default judgment on a promissory note, and from an order denying a motion to vacate the default.

On March 7, 1916, defendant made to William Fitzer & Company, or order, a promissory note for \$265.53, due April 1, 1916. The payee indorsed the note to the plaintiff. According to the affidavit of defendant the summons and complaint were served on him February 6, 1917, and by his written admission, on March 17, 1917, at Larimore, North Dakota, the summons and complaint were personally served on him. By oral agreement his time to answer was extended till May 1, 1917. On May 5th he went to Grand Forks and retained attorney Joseph Coghlan to answer. Coghlan was in no haste to answer, but as it appears on May 19th, he was about to answer when he collided with an automobile and was put out of business for two weeks. When he recovered, in June, the attorney for plaintiff refused to accept an answer and on September 24th, after due notice to Coghlan, judgment was taken by default. Both before and after judgment defendant moved to vacate the default. The motion was made on the usual affidavit of merits and on a proposed verified answer and on affidavits of himself and his attorney. However, the affidavits do not excuse the default and the answer fails to show a meritorious defense. It avers that the plaintiff is not a good faith purchaser of the note; that it was given on the price of two grain drills and a tractor disc harrow, at the price of \$631, of which \$100 was paid in cash; that the vendor warranted the machinery to be of good first-class workmanship, and to be in all respects first class and of the best and highest grade material and workmanship and superior to all other makes, whereas it was wholly worthless for any purpose; that it was faulty in construction and of poor material and of no value. The proposed answer deals in mere generalities. It contains no specific showing concerning the alleged warranty or the breach of the same. It is in no manner convincing, and, on the contrary, it gives a decided impression that it is not true. The record shows counsel for plaintiff has been courteous in extending time to answer, and that he did not seek or take a snap judgment.

Seven months after the service of the summons and complaint the judgment was entered on due notice to the defendant's attorney.

Order and judgment affirmed.

BIRDZELL, J. I concur, but express no opinion on the validity of the defense pleaded.

GRACE, J. I concur in the result only.

BRONSON, J., being disqualified did not participate.

CHRISTIANSON, Ch. J. (concurring specially). I am not prepared to say that the proposed answer in this case fails to state a defense. But I am entirely agreed that upon the record as a whole there was no abuse of discretion on the part of the trial court in refusing to relieve the defendant from his default.

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EDGAR C. STRATTON, Respondent, v. N. T. ROSENQUIST,  
Appellant.

(171 N. W. 621.)

**Appeal and error — successive verdicts.**

In this case defendant conveyed to the plaintiff a quarter section of land, with covenants of title and quiet possession. The ruthless and rushing Missouri river had seized and taken possession of about half the land, running across it on the longest diagonal, and lessening the value of every acre. This, of course, the plaintiff did not know. Twice the defendant has had a fair trial and twice the jury has found a verdict against him, and the record presents no good reasons for a third trial. There must be an end to litigation.

Opinion filed February 5, 1919. Rehearing denied March 15, 1919.

Appeal from the District Court of Williams County, Honorable *Frank E. Fisk*, Judge.

Affirmed.

*Palmer, Craven, & Burns* and *Fisk & Murphy*, for appellant.

There are two kinds of fraud, actual and constructive. In the case at bar, we have to deal with the former only. Our Civil Code, Compiled Laws, § 5849, defines actual fraud. Comp. Laws 1913, § 5944; 12 R. C. L. p. 230, § 3, p. 240, and authorities; *Nounnan v. Sutter County Land Co.* 81 Cal. 1, 6 L.R.A. 219, 22 Pac. 515; *Marchall McCartney Co. v. Holloran*, 15 N. D. 71; *Dauids v. Jorden*, 47 Cal. 351.

Damages for a tort are merely compensatory in their nature, and they should be restricted except in certain respects, such as exemplary damages, etc., to such sum as will make the injured party whole. *Sigafus v. Porter*, 179 U. S. 116, 45 L. ed. 113, and *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279.

"The correct measure of damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation and is limited to compensation." See numerous cases cited in 20 Cyc. 135, 136; also *Cook v. Hale*, 210 Fed. 340; *Tillus v. Lumber Co. (Ala.)* 65 So. 1015; *Jones v. Morgan*, 119 Minn. 434, 138 N. W. 686; *Magnusson v. Burgess*, 124 Minn. 374, 145 N. W. 32; *Realty, etc. Co. Corp. v. Vanderpoel*, 127 Minn. 89, 148 N. W. 895; *Tripler v. Fairchild*, 167 App. Div. 197, 152 N. Y. Supp. 624; *Zobust v. Estes*, 65 Or. 573, 133 Pac. 644; *Beckwith v. Powers (Tex. Civ. App.)* 157 S. W. 177; *Pyle v. Pyle (Tex. Civ. App.)* 159 S. W. 488; *Lathan v. Snell (Tex. Civ. App.)* 176 S. W. 917; *Bounck v. McAulay (Wash.)* 147 Pac. 33; *Granstandt v. Skinner*, 165 Cal. 721, 134 Pac. 329; *Hinchey v. Starrett*, 91 Kan. 181, 137 Pac. 81; *Rockefeller v. Merriett*, 35 L.R.A. 633, 40 U. S. App. 666; *George v. Hesse (Tex.)* 93 S. W. 107, 8 L.R.A.(N.S.) 804 and extensive note, also 123 Am. St. Rep. 772; *Ritko v. Grov (Minn.)* 113 N. W. 629. See 20 Cyc. 140; 39 Cyc. 1589, and numerous cases cited. *Equity Trust Co. v. Mulligan (Ind.)* 65 N. E. 1044; *Boggs v. Harper*, 45 W. Va. 554, 31 S. E. 943; *Shirk v. Lingeman*, 59 N. E. 941; *Patten v. Neischmeider (Ky.)* 66 S. W. 1003.

*Wm. G. Owens and Geo. H. Moelling*, for respondent.

The expression of an opinion merely under relations of confidence

may constitute fraud, as in realty representations. *Liland v. Tweto*, 19 N. D. 551; *French v. Ryan* (Mich.) 62 N. W. 1016; *Dowagiac Mfg. Co. v. Mahon & Robinson*, 13 N. D. 517.

The suppression of material facts constitutes fraud. Comp. Laws, § 5849; *Liland v. Tweto*, supra; *Barron v. Meyers* (Mich.) 109 N. W. 862; *Berge v. Eager* (Neb.) 123 N. W. 454; *Nohr Star Lumber Co. v. Rosenquist*, 29 N. D. 566.

It is not true that the law will never imply fraud without direct and positive proof. Under a rule so stringent fraud would rarely be proved. *Kaine v. Wigley*, 22 Pa. 179; *Montgomery Webb Co. v. Dinely*, 133 Pa. 585, 19 Atl. 428; *Strauss v. Kranert*, 56 Ill. 254; *Bowden v. Bowden*, 75 Ill. 143; *Markbury v. Taylor*, 10 Bush, 519; *Gill v. Crosby*, 63 Ill. 190; *Chronister v. Anderson*, 73 Ill. App. 524; *Hopkins v. Seivert*, 58 Mo. 201; *Albert v. Besel*, 88 Mo. 150; *Mosby v. Commission Co.* 91 Mo. App. 500; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Knowlton v. Schultz*, 6 N. D. 417; *Whitbeck v. Lees* (S. D.) 73 N. W. 915; *Liland v. Tweto*, 19 N. D. 551; *Lunscheon v. Wocknitz* (S. D.) 111 N. W. 632; *McCabe v. Desnoyer* (S. D.) 108 N. W. 341; *Sallies v. Johnson* (Conn.) Ann. Cas. 1913A, 386; 20 Cyc. 25; *Chilson v. Houston*, 9 N. D. 498; *French v. Ryan* (Mich.) 62 N. W. 1016; *Fargo Gas & Coke Co. v. Fargo Gas & E. Co.* 4 N. D. 219; *Dowagiac Mfg. Co. v. Mahon & Robinson*, 13 N. D. 517; *North Star Lumber Co. v. Rosenquist*, 29 N. D. 566; *Guild v. More*, 32 N. D. 432.

As to what constitutes proper measures of damages in a case of this kind. *Fargo Gas & Coke Co. v. Fargo Gas & E. Co.* 4 N. D. 219; *Beare v. Wright*, 14 N. D. 26; *Guild v. More*, 32 N. D. 476.

The instructions must be taken as a whole. *First Nat. Bank v. Minneapolis & N. Elev. Co.* 11 N. D. 280; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343; *Stoll v. Davis*, 26 N. D. 379.

ROBINSON, J. This case was before the court on a former appeal. 37 N. D. 121, 163 N. W. 723. In the first trial the jury found a verdict against defendant for nearly \$800. He made a motion for a new trial. The court granted his motion and he appealed. This court held that when a party does not want a new trial, he should not ask for it, and dismissed the appeal. Now the verdict is for \$1,360 and interest, and defendant wants a third trial.

He assigns numerous errors, but the only real question is on the sufficiency of the evidence. On December 1, 1914, for an express and agreed consideration of \$1,900, defendant conveyed to the plaintiff a quarter section of land in 27-154-97: S.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , and N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ .

The deed contained a covenant of good title and quiet possession and covenant that the grantor was well seised in fee of the land, but in truth he was not seised in fee of the land, and the plaintiff was not given quiet possession. At the time of the transfer one half of the land was seized by the ruthless, aggressive, and onrushing Missouri river, and the other half was corroded and broken so that it was of little value. The plats and the evidence show that by changing its course so as to straighten its channel, the river runs diagonally across the land from the southwest corner to the northeast corner. The part of the land not corroded or covered by the river is of little value. It cannot be farmed to any advantage.

The complaint avers, and the evidence shows, that to induce the plaintiff to purchase the land, defendant knowingly misrepresented its character and condition; that plaintiff relied on such representations. The court charged the jury thus: "Before the plaintiff can recover, he must establish by a fair preponderance of the evidence that the representations charged in the complaint were made by defendant to him, and that they were false, and that the plaintiff believed the representations to be true and relied on them, and was thereby induced to make the trade or purchase." The court charged on the measure of damages: That it was the difference between what the land would have been worth if as represented, and what it actually was worth at the time of the sale. The charge was altogether favorable to defendant. The plaintiff was not bound to rely wholly on the alleged fraud. He had also a right to rely on the covenants in his deed and to recover according to the same measure of damages.

In an action for a breach of covenants in grants the detriment for the breach of covenant of seisin, of right to convey, and of warranty of quiet enjoyment, is deemed to be: (1) The price paid by the grantee, or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the

grant to the value of the whole property; (2) interest thereon at 6 per cent. Comp. Laws § 7149.

In this case it cannot be maintained that only 60 or 80 acres of the land were affected by the breach; on the contrary, by dividing the land on the longest diagonal and subjecting it to continuous erosion and inundation, the breach affected and lessened the value of every acre of the land. The whole property was affected by the breach. Hence, on the covenants in the deed, the measure of damages was the price of the property, less its actual value, with interest on the same at 6 per cent; and that is the rule of damages submitted to the jury.

Fraud or no fraud, on the pleadings and the evidence the plaintiff was clearly entitled to judgment. He was entitled to insist on the fraud and also on the covenant in his deed. If the false representations were made in good faith they were equally as injurious as if made in bad faith. In such a case the good or bad faith of affirmation is of little consequence. The charge of the court is in no way injurious to the defendant, and the verdict is well sustained by the evidence. The only real question was on the amount of damages, and the specification regarding the sufficiency of the evidence does not point to any insufficiency on the damage question; nor does the evidence show any insufficiency. There is no reason for a third trial of this case. There must be an end to litigation.

Judgment affirmed.

GRACE, J. I concur in the result.

BIRDZELL, J. (concurring specially). I concur in the affirmance of the judgment, but I do not concur with what is said in the opinion of Mr. Justice Robinson relative to the breach of the covenant of quiet enjoyment. The complaint, it is true, alleges a cause of action for the breach of a covenant of quiet enjoyment, but its main allegations are allegations of false and fraudulent representations and damages incident thereto. At the beginning of the trial a motion was made that the plaintiff be required to elect as to whether he would stand upon the cause of action for fraud, or upon that for breaches of warranties and covenants in the deed, and in response to this motion, plaintiff's attorney stated: "There isn't any question as to the position of the plain-

tiff as to our theory of the case being based upon the allegations of fraud as an element of damages upon which we expect to recover." In view of that statement, the trial court did not rule upon the motion, and the record shows that the case was tried upon the theory of deceit. For this reason, I am of the opinion that the judgment will have to stand or fall as a judgment for damages in an action of deceit.

The only serious question is that of the sufficiency of the evidence to show a representation by the defendant which plaintiff was justified in relying upon and which he did rely upon. The argument upon this question is concerned principally with the plaintiff's own testimony. It appears that the defendant had testified that he had told the plaintiff, in substance, that he did not know how many acres were in the river, that there might be 1 or 160 acres of it.

The plaintiff, in rebuttal, when being examined by his own counsel, testified as follows:

Q. In any of this talk that you had with Rosenquist, did he say to you or in your presence that he did not know how much of the land was in the river,—there might be 1 or 160 acres of it?

A. Not that time; it was the time we came back after we made this trip.

Q. After you had made the trip?

A. Yes, sir.

Q. That was when you told him that you would have to rely upon what he said?

A. Yes, sir.

Q. And was that the time when he said there wasn't over 3 to 5 acres in the river?

A. Yes, sir.

It is contended that the plaintiff in this testimony admitted that the defendant had told him that he did not know how many acres were in the river, that there might be 1 or 160. If the testimony is fairly susceptible of this construction, it would follow that no representation was made. A statement of this character, standing alone, would go a long way toward putting the plaintiff upon his guard, and would amount to an announcement that the defendant would not undertake to say how

many acres of land had been destroyed by the river. But the statement does not stand alone. The plaintiff further testified that during the same conversation he told him that he would have to rely upon his statement as to the number of acres, since he couldn't get to the land. And he further states that the defendant said that there weren't over 3 to 5 acres in the river. It appears to us that a fair construction of the plaintiff's testimony is that he would not deal with the defendant except upon the basis of the truth of the defendant's statement that there weren't over 3 to 5 acres in the river.

CHRISTIANSON, Ch. J. (concurring specially). I agree with Mr. Justice Birdzell as to the theory upon which plaintiff's recovery in this case must be sustained. I have had considerable, and still entertain some, doubt as to the sufficiency of the evidence to establish any false representations on the part of the defendant. But when all the evidence, facts, and circumstances are considered, I am not prepared to say that there is no substantial evidence whatever tending to support the findings of the jury.





# INDEX

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## ACCOUNT.

1. Upon an action for an accounting, judgment in the trial court was had in favor of the defendant, and upon examination of all the evidence upon which such judgment is based, held, that such judgment should be modified, for the reason that the plaintiff is entitled to various credits for which he had not been credited, either by the defendant or by the trial court. *Herold v. Hill*, 30.
2. In an action for accounting, evidence examined and held to sustain the judgment. *Lahart v. Minnesota Grain Company*, 111.

## ADVERSE POSSESSION.

1. This is an action to determine an adverse claim to a quarter section of land. The plaintiff has title under a mortgage foreclosure. The long answer of defendant covers twelve printed pages. It shows clearly and specifically that the plaintiff has title and defendant has no title. *Maas use of Wolfe v. Wilbur*, 142.

## AGENCY.

1. Under the doctrine of respondeat superior a husband is liable for the negligent operation of an automobile owned by him and driven by his wife, with his full acquiescence and consent for purposes of business or pleasure of the family. *Vannett v. Cole*, 260.
2. This is an action on a promissory note of the Jamestown Gas Company. The note was given for the balance of an account due from the Gas Company, to the plaintiff. It was made in the name of the Company by one A. D. Grant, who was the general agent, general manager, secretary and treasurer of the company. It is held that Grant has ostensible authority to execute the note on behalf of the gas company. *MacKay v. Jamestown Gas Company*, 471.
3. In an action brought for the recovery of the reasonable value of services rendered in securing renters for lands owned by the defendant, the evidence is examined and held to be sufficient to establish such reasonable value. *Hanson v. Summerville*, 482.

**APPEAL AND ERROR.**

1. Where the evidence is not contained in the record transmitted to this court, it must be assumed that the evidence adduced upon the trial established the facts as found by the trial court. *State ex rel. Livingston v. Rose*, 251.
2. Under the provisions of § 8 of chapter 31 of the Laws of 1913, it will be presumed on appeal that a new trial was not granted on account of the insufficiency of evidence to support the verdict, unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in a memorandum prepared by the trial judge. *Pratt v. Huber Mfg. Co.* 301.
3. Where a special verdict is submitted to the jury, which covers all of the material issues of the case, and such findings are in favor of the defendant, such defendant is entitled to the reception of the same and judgment thereon, and an order overruling a motion for such judgment and followed by an order for a new trial is an appealable order and comes within the provisions of § 7841 of the Compiled Laws of 1913, which makes orders appealable which effect a substantial right, when such order in effect determines the cause and prevents a judgment from which an appeal might be taken. *Boulger v. Northern P. R. Co.* 316.
4. Where a notice of an appeal embraces both an appeal from a default judgment and from an order refusing to vacate the judgment, the appeal, will not, on motion, be dismissed as duplicitous. *Fargo Silo Company v. Pioneer Stock Company*, 345.
5. An undertaking on appeal, sufficient to operate as a supersedeas under the provisions of § 7825 of the Compiled Laws of 1913, which recites the appeal from an order refusing to vacate a judgment as well as the appeal from the judgment itself, and which is conditioned for the payment of damages and costs and for the payment of the judgment, if either the judgment or the order appealed from is affirmed, is a sufficient undertaking to support the appeal from the order and the judgment. *Fargo Silo Company v. Pioneer Stock Company*, 345.
6. An application for a change of place of trial for the convenience of witnesses is addressed to the sound, judicial discretion of the trial court, and the appellate court will not interfere unless an abuse of discretion is shown. *Curren v. Story*, 361.
7. In the instant case it is held that an application for a change of place of trial for the convenience of witnesses was properly denied. *Curren v. Story*, 361.
8. Proper notice of the entry of a judgment is given by the service of a copy of the findings and order for judgment, the judgment, taxation of costs, and notice of the retaxation thereof, so as to start running the statutory time within which an appeal may be made. *National Union Fire Insurance Company v. Martin*, 393.
9. An appeal taken from a judgment, more than six months after notice of the entry of such judgment has been served, confers no jurisdiction in this

**APPEAL AND ERROR—continued.**

- court to consider the same except for purposes of dismissal. *National Union Fire Ins. Company v. Martin*, 393.
10. In an action of assault and battery, it is not prejudicial error to refuse testimony that the witness has been convicted of a criminal charge in a criminal action where it is not shown to the court or it does not appear that the purpose of such testimony is either to affect the credibility of the witness or to prove an admission against interest by a proof of a plea of guilty in a criminal action for the same assault and battery. *Engstrom v. Nelson*, 530.
  11. In this case defendant conveyed to the plaintiff a quarter section of land, with covenants of title and quiet possession. The ruthless and onrushing Missouri river had seized and taken possession of about half the land, running across it on the longest diagonal, and lessening the value of every acre. This, of course, the plaintiff did not know. Twice the defendant has had a fair trial and twice the jury has found a verdict against him, and the record presents no good reasons for a third trial. There must be an end to litigation. *Stratton v. Rosenquist*, 647.

**ATTORNEY AND CLIENT.**

1. In an action brought for the recovery of reasonable attorney's fees earned in conducting litigation for the defendant, and for necessary expenses incurred therein, the evidence is examined and held to support the verdict *Hildreth v. Honsinger*, 485.

**AUTOMOBILES.**

1. Under § 2972, Compiled Laws of 1913, it is the duty of an auto driver who has observed a pedestrian about to cross a street crossing in front of his automobile, while operating the same upon the public streets of a city, to give warning of his approach by bell or by horn, if thereby injury can be avoided. *Vannett v. Cole*, 260.

**BANKS AND BANKING.**

1. Under the laws of this state the receiver of an insolvent bank may enforce against stockholders the added statutory liability prescribed by § 5168, Compiled Laws 1913. *Davis v. Johnson*, 85.
2. It is held that in the instant case the evidence and findings justify a judgment against the defendant as a stockholder in an insolvent bank for the amount of such added statutory liability. *Davis v. Johnson*, 85.

**BASTARDS.**

1. The legal proceedings in cases of bastardy, though commenced in somewhat 41 N. D.—42.

**BASTARDS—continued.**

- similar manner to those of a criminal case, that is, by the making of a complaint and the issuing of a warrant of arrest based upon the complaint, are, nevertheless, under our statute, civil in their nature. *State of North Dakota v. Heirtz*, 55.
2. Defendant was put upon his trial before a court and jury on the charges of bastardy, and the jury returned the verdict against him. Held, that the verdict is amply sustained by the evidence. *State of North Dakota v. Hiertz*, 55.

**BILLS AND NOTES.**

1. In an action brought upon a promissory note by the holder thereof, who claimed to have purchased the same before maturity for value, one of the defenses to the note was that it was not purchased by the plaintiff before maturity, and that after maturity of the note the defendant was released therefrom by the payee in said note and the note canceled as to the defendant. There being conflicting testimony in this regard, and the jury having found a verdict in favor of the defendant, it is held upon examination of the evidence, that the verdict is supported thereby. *Gardner v. Lindeman*, 25.
2. Where a promissory note is executed conditionally, and delivery is made, in violation of such conditions, no liability arises on such note. *Marlatt v. Couture*, 127.
3. Where a promissory note is procured by false and fraudulent representations, the same has no validity and the maker incurs no liability thereon. *Marlatt v. Couture*, 127.
4. Where a promissory note is given for corporate stock, assuming that the conditions were such that a promissory note could be legally given, no liability arises upon the note in absence of the delivery of the stock. *Marlatt v. Couture*, 127.
5. The giving of a renewal note does not create an estoppel so as to prevent the urging against the renewal note any defenses which the maker of the renewal note may have had against the enforcement and collection of the original note. As between the original holder and maker of the note, where the holder of such original note or obligation has not parted with anything of value or assumed a more detrimental position by reason of the taking of the renewal note, any defense to or infirmity of the original note which might have been opened to the maker of the original note, in the event he had been sued thereon, is equally open and retained to him where he has executed the renewal note and suit is brought upon the renewal note. *Scandinavian American Bank v. Westby*, 276.

**BROKERS.**

1. In an action by a broker to recover commissions earned under an express contract upon a sale of real property, where it appeared that the owner of the property co-operated in the negotiations with a purchaser produced by the broker, and where, during the process of the negotiations, the gross price was scaled by the owner before the final contract of sale was executed, without any modification of the agreement relating to commissions and without a termination of the agency, it is held that the broker is entitled to recover the full commission. *Red River Valley Land Co. v. Hutchinson*, 193.

**CARRIERS.**

1. The character or equipment which a carrier must provide and allowances which it must make for instrumentalities supplied, and services rendered, by the shipper—such as lining cars used in transporting carload shipments of grain in bulk—are problems which directly concern rate making and are peculiarly administrative on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court. *Midway Co-op. Elevator Company v. Great Northern R. Co.* 1.
2. An employee of an interstate railway carrier, who is injured while removing snow from a track over which interstate trains are being run regularly, is engaged in interstate commerce within the meaning of the Employers' Liability Act of Congress of April 22, 1908. *Koofos v. Great Northern R. Co.* 176.
3. The Federal Employers' Liability Act abolished the doctrine of contributory negligence as a bar to recovery, and established the doctrine of comparative negligence. *Koofos v. Great Northern R. Co.* 176.
4. Under the Federal Employers' Liability Act, the damages recoverable by an employee guilty of contributory negligence bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Koofos v. Great Northern R. Co.* 176.

**COMMERCE.**

1. The regulations of interstate commerce provided by Congress are supreme, and any state regulations in conflict therewith or covering the same subject are superseded thereby. *Midway Co-op. Elevator Company v. Great Northern Railway Company*, 1.
2. The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on, and a full control by Congress over the acts committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *Midway Co-op. Elevator Company v. Great Northern Railway Company*, 1.

**COMMERCE—continued.**

3. The Interstate Commerce Commission has exclusive jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential or prejudicial, and the courts may not, as an original question, hear complaints and pass upon any of the administrative questions which the Interstate Commerce Act has invested the Interstate Commerce Commission with power to determine. *Midway Co-op. Elevator Company v. Great Northern Railway Company*, 1.
4. Without preliminary action by the Interstate Commerce Commission a state court has no jurisdiction of an action by a shipper to recover from an interstate carrier sums expended by him (the shipper) in lining and cooping cars furnished by the carrier for interstate carload shipments of grain in bulk, the applicable duly filed interstate rate schedules making no reference to allowances therefor. *Midway Co-op. Elevator Company v. Great Northern Railway Company*, 1.
5. An employee of an interstate railway carrier, who is injured while removing snow from a track over which interstate trains are being run regularly, is engaged in interstate commerce within the meaning of the Employers' Liability Act of Congress of April 22, 1908. *Koofos v. Great Northern R. Co.* 176.

**CONSTITUTIONAL LAW.**

1. The Federal Constitution grants power to Congress to regulate commerce, and in executing this power it may enact such laws and provide such regulations as national interest may demand. *Midway Co-op. Elevator Company v. Great Northern R. Co.* 1.

**CONTEMPT.**

1. In a contempt proceeding under § 10,118, Comp. Laws 1913 (the prohibitory law), the party charged with contempt is not entitled to a trial by jury. *State v. Markuson*, 5 N. D. 147, 64 N. W. 934, 7 N. D. 155, 73 N. W. 82, reaffirmed. *State of North Dakota v. Finlayson*, 494.
2. One charged with such contempt of court is not entitled to a jury trial as a matter of right. And § 10,118, Comp. Laws 1913, providing for trial by court, without a jury, on an inquiry for contempt, does not contravene the constitutional provisions relating to a trial by jury. *State of North Dakota v. Finlayson*, 494.
3. The procedure in contempt cases arising under the prohibitory law of the state is governed by the special provisions founded in such law, and the provisions of the Code of Civil Procedure relating to contempts in general do not govern in contempt cases arising under the prohibitory law. *State of North Dakota v. Finlayson*, 494.

**CONTEMPT—continued.**

4. For reasons stated in the opinion it is held that the contempt charged is not barred by the Statute of Limitations. *State of North Dakota v. Finlayson*, 494.
5. In an affidavit filed as a basis for a warrant of attachment in a contempt proceeding under the prohibitory law of the state wherein the defendant is charged with contempt as a second offense, the former conviction need not be set forth at length, but a brief allegation of such conviction is sufficient. *State of North Dakota v. Finlayson*, 494.

**CONTRACTS.**

1. Where the owner of real property makes an offer by mail to sell and states in such offer, that "if you want to buy the land you must do so immediately, or else I will rent it out for the coming year," and the persons to whom the offer is made do not reply for seventeen days, the person making such offer is released, as the acceptance comes too late. *Ness v. Larson*, 211.
2. Where a second offer is made stating that the parties may purchase on the same terms if they will take the owner's share of the rent, or, if they can make some satisfactory arrangements with the tenant, and it appears that they never saw the tenant and did not know the amount of rent the owner was to receive, that there was no such offer and acceptance or meetings of the minds as constitute the making of a valid, binding, and enforceable contract. *Ness v. Larson*, 211.
3. Although the usual presumption is that services rendered by a child to its parents are gratuitous in the absence of an express contract therefor, nevertheless, where the circumstances are exceptional and the character of the services rendered peculiar, a contract may be implied to pay for such services. *Bergerson v. Mattern*, 404.
4. In an action brought for the recovery of the reasonable value of services rendered in securing renters for lands owned by the defendant, the evidence is examined and held to be sufficient to establish such reasonable value. *Hanson v. Summerville*, 482.
5. Under § 8120, Compiled Laws 1913, relating to the foreclosure of land contracts, which provides that notice of cancellation must be served upon the vendee or purchaser, or his assigns, it is incumbent upon the vendor in a land contract, who has notice or knowledge of the fact that the vendee has assigned his interest in the contract, to serve notice of cancellation upon the assignee. *Buller v. Falk*, 624.
6. Held for reasons stated in the opinion that the land contract in the instant case was not canceled by reason of the failure of the vendor to serve notice of cancellation upon the assignee of the vendee. *Buller v. Falk*, 624.



## CONVERSION.

1. In an action for conversion by the mortgagee for the conversion of a certain quantity of flax seed, the land upon which the crop is alleged to have been grown was described in one of the chattel mortgages as "land in section 25, township 134, range 91," and in the other as "all crops on land in sections 18 and 31, township 134, range 90;" held that the description is too indefinite and uncertain to constitute notice to purchasers for value of crops which may have been grown upon such indefinite description of land. *First State Bank of New Leipzig v. Kellogg Commission Company*, 269.

## CORPORATIONS.

1. This is an action on a promissory note of the Jamestown Gas Company. The note was given for the balance of an account due from the gas company to the plaintiff. It was made in the name of the company by one A. D. Grant, who was the general agent, general manager, secretary and treasurer of the company. It is held that Grant had ostensible authority to execute the note on behalf of the company. *MacKay v. Jamestown Gas Company*, 471.
2. In an action upon a contract by a foreign corporation which has not complied with the statute, § 5238, Compiled Laws 1913, imposing conditions precedent to the right to do business in this state, the noncompliance of such corporation with the statute is a matter of defense to be alleged and proved by the defendant, unless the complaint clearly shows a violation of the statute. *Brioschi-Minuti Company v. Elson-Williams Construction Company*, 628.
3. The transaction or doing of business in this state within the inhibition of the statute does not cover a single business transaction or an isolated transaction, following *State use of Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55. *Brioschi-Minuti Company v. Elson-Williams Construction Company*, 628.
4. Where, in such action, the complaint alleges the furnishing of labor and material for ornamental plaster work in the construction of county buildings and necessarily the performance of some of the work and the furnishing of some of the material in this state, it is held that such allegations do not necessarily aver a transaction or doing of business in this state contrary to the statute. *Brioschi-Minuti Company v. Elson-Williams Construction Company*, 628.
5. Where, in such action, the answer does not allege affirmatively that the plaintiff has transacted or done business in this state contrary to the statute, it is insufficient to establish the defense of noncompliance with the statute. *Brioschi-Minuti Company v. Elson-Williams Construction Company*, 628.

## COUNTIES.

1. Where a statutory contractor's bond is furnished under the provisions of § 6832, Compiled Laws 1913, a direct obligation exists in favor of those who furnish labor or material, for whose benefit such bond is given, and a surety thereon cannot be released or exonerated from this obligation through an assignment of the principal contract a change in its terms, the default of the principal contractor, or an improper payment of moneys due thereunder, even though made without the knowledge or consent of the surety, where the obligee therein who has furnished labor or material pursuant to the original contract has not participated in such changes, had knowledge thereof, nor consented thereto. *Brioschi-Minuti Company v. Elson-Williams Construction Company*, 628.

## COURTS.

1. The district court is a court of general jurisdiction, and where the parties to a controversy the subject-matter of which is properly within the jurisdiction of such court voluntarily adopt a certain mode of procedure in submitting the controversy for determination, they will not thereafter be heard to say that the procedure adopted was irregular and improper. *Trott v. State of North Dakota*, 614.

## COVENANTS.

1. In a written contract for the exchange of property where the defendants exchanged a quarter section of land at the agreed price of \$40 per acre with the plaintiff for his certain stock of merchandise, the balance of purchase price of land being settled for by taking plaintiff's promissory notes, and such written contract among other provisions contained the following clause: "We further agree within one year from date to find a buyer for said land at a price not less than \$40 per acre to said Joseph Boxell;" held that the same constituted a binding covenant on the part of the defendants to sell the land within one year. If the defendants failed to do so, they were liable in damages for the difference between the reasonable value of the land and \$40 per acre. After the expiration of the year, plaintiff sold the land for \$5,080, and the proof is sufficient to show that that was the reasonable value of the land at the time plaintiff sold it; that the measure of damages was the difference between that sum and \$40 per acre; that the above clause in the contract was relied upon by the plaintiff and to him constituted an inducement to make the contract. It was one of the principal elements of it, and was not, as claimed by defendant, a mere broker's agreement. *Boxell v. Grant*, 566.

## CRIMINAL LAW.

1. Barring the exceptional cases enumerated in § 10,628, Comp. Laws 1913, a preliminary examination or a waiver thereof is a necessary prerequisite to a prosecution by criminal information, unless the offense charged "is committed during the continuance of the term of the district court in and for the county or the judicial subdivision in which the offense is committed or triable." *State of North Dakota v. Finlayson*, 77.
2. For reasons stated in the opinion it is held that the defendant was entitled to a preliminary examination for the crime charged in the information and that it was error to deny a motion to set aside the information based upon the ground that a preliminary examination had neither been had or waived. *State of North Dakota v. Finlayson*, 77.

## DAMAGES.

1. This is a personal injury suit in which plaintiff seeks to recover for an injury resulting from the alleged negligence of the defendant. For error in the instructions, the judgment is reversed and the case remanded for a new trial. *Koofos v. Great Northern R. Co.* 177.
2. Under the Federal Employers' Liability Act, the damages recoverable by an employee guilty of contributory negligence bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Koofos v. Great Northern R. Co.* 177.
3. Where the casual negligence is partly attributable to the employer, the contributory negligence of the employee will not defeat recovery, but only lessen the damages. It is only when the employee's act is the sole cause,—when the employer's act is not part of the causation,—that the employer is free from liability under the Federal Employers' Liability Act. *Koofos v. Great Northern R. Co.* 177.
4. It is negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. *Koofos v. Great Northern R. Co.* 177.
5. A servant who refrains from abandoning certain work on the assurance of his master that he will remove a known peril cannot ordinarily be said to have assumed the risk of injury from such peril. *Koofos v. Great Northern R. Co.* 177.
6. In an action brought by a share cropper for the conversion of his share of grain raised upon land belonging to the defendant, the action having been seasonably brought and diligently prosecuted, it is held that the plaintiff is entitled to the highest market value of the property between the date of the conversion and the verdict. *Collard v. Fried*, 242.
7. In an action for personal injuries sustained by collision with an automobile, evidence held to require the submission of the question of defendant's

**DAMAGES**—continued.

- negligence and plaintiff's contributory negligence to the jury. *Vannett v. Cole*, 261.
8. Where the plaintiff in an action for injuries is struck and knocked down senseless by collision with an automobile, held under the evidence, the maxim raised, *res ipsa loquitur*, does not apply. *Vannett v. Cole*, 261.
  9. Where it appears that part of the damage in a tort action was caused by a third party or a third cause, the plaintiff, unless a conspiracy or a joint tort can be proved, can only recover against the defendant such damages as he can show were occasioned by defendant's wrong. *Boulger v. Northern P. R. Co.* 316.
  10. In the instant case it is held that there is no competent evidence of value. *American Coal Briquetting Company v. Minneapolis, St. Paul & S. Ste. Marie R. Co.* 381.
  11. In a civil action for the malicious destruction of property under § 10,050, Comp. Laws 1913, it is proper for the jury, under proper instructions to award treble damages in a general verdict, or the trial court may require the jury to return a verdict upon the actual damages and a special finding upon the question of malice, and thereupon award the treble damages under the statute. *Wacker v. Mertz*, 620.
  12. In such action for the malicious destruction of a threshing separator, it is held that a general verdict so rendered for treble damages is proper. *Wacker v. Mertz*, 620.

**DEEDS.**

1. An action was brought by one Powell against the International Harvester Company of America, Patrick D. Norton and Mary E. Norton, et al. for the purpose of having a deed to certain land declared to be held in trust for the International Harvester Company. The deed was executed by the owner, one Largent, to Patrick D. Norton, who was the collection agent of the Harvester Company. Held that Patrick D. Norton did not take the deed nor hold the land therein described, in trust for the International Harvester Company. *Powell v. International Harvester Company of America*, 220.
2. In a transfer of certain land by deed from Largent, the owner, to one Patrick D. Norton, it is held that if fraud existed in procuring such transfer, Powell, the plaintiff, who had a mortgage upon the land conveyed by the deed, which mortgage was being foreclosed, not being a party to the conveyance of the land by deed from Largent to Norton, is in no position to assert fraud. If there were fraud in the procuring of the deed from Largent by Norton, it is a matter which can only be asserted by the parties to the transaction, in this case, Largent. *Powell v. International Harvester Company of America*, 220.

## DEPOSITIONS.

1. An order sustaining exceptions to and suppressing a deposition is not appealable. *Kennelly v. Northern P. R. Co.* 395.
2. Where it clearly appears that an order is not appealable, the court will dismiss the appeal on its own motion, whether the point is raised by the appellee or not. *Kennelly v. Northern P. R. Co.* 395.

## DIVORCE.

1. The plaintiff brings this action for a divorce on the ground of extreme cruelty, but the evidence shows that defendant has been too submissive and the plaintiff has been guilty of wilful desertion and wilful neglect. Judgment reversed and action dismissed. *Wolf v. Wolf*, 109.
2. In this case it appears, as alleged in the answer, that plaintiff has been guilty of extreme cruelty by inflicting on the defendant grievous bodily injury and grievous mental suffering, so as to make it unsafe and improper for her to live with him as his wife. Hence, the marriage between the plaintiff and the defendant is dissolved. The care and custody of the minor children is awarded to neither party to the exclusion of the other, but the plaintiff must pay for the care and keeping of the children. *Random v. Random*, 163.

## ELECTIONS.

1. In an action by plaintiff to perpetually enjoin and restrain defendants from taking any further proceedings in the matter of submitting to the electors of Steele county at the primary election to be held June 26th, 1918, the question of the removal of the county seat of Steele county, and from distributing ballots therefor, and canvassing returns from the votes at such primary election, such primary election for the removal of said county seat being held under and pursuant to the provisions of chapter 102 of the Session Laws of 1917, which relates only to the removal of that class of county seats not on a railroad or an interstate river, it is held the relief prayed for should be denied. *Bugbee v. Steele County*, 155.
2. The form and substance of the petition, notice and ballot used in said primary election were a sufficient compliance with the requirements of chapter 102 of the Session Laws of 1917, and other laws adopted as a part thereof. *Bugbee v. Steele County*, 155.
3. The original jurisdiction of the supreme court may properly be invoked in a mandamus proceeding involving the right of possession of the office of superintendent of public instruction. *State of North Dakota ex rel. William Langer v. McDonald*, 389.

**ESTOPPEL.**

1. The giving of a renewal note does not create an estoppel so as to prevent the urging against the renewal note any defenses which the maker of the renewal note may have had against the enforcement and collection of the original note. As between the original holder and maker of the note, where the holder of such original note or obligation has not parted with anything of value or assumed a more detrimental position by reason of the taking of the renewal note, any defense to or infirmity of the original note which might have been opened to the maker of the original note, in the event he had been sued thereon, is equally open and retained to him where he has executed the renewal note and suit is brought upon the renewal note. *Scandinavian American Bank v. Westby*, 276.

**EVIDENCE.**

1. Where a series of letters passing between plaintiff and defendant are introduced as part of the cross-examination of the defendant the letters are held to have a bearing upon the credibility of the defendant as a witness and to have been properly admitted for the purpose stated, even though the letters of the plaintiff contain self-serving statements. *McCurdy v. Aylor*, 187.
2. The plaintiff not claiming damages for losses accruing to him after the ewes came into his possession, evidence as to their care by the plaintiff was properly excluded. *McCurdy v. Aylor*, 187.
3. In an action against an executor and the heirs at law of the estate of a deceased, to secure the delivery of a deed and to quiet title to realty claimed by the estate, the testimony of the executor, the husband of the plaintiff, concerning a transaction had with the deceased, is not made admissible under the provisions of § 7871, Compiled Laws of 1913, subd. 2, by calling such witness as an adverse party where it appears that such evidence and such witness are antagonistic to the interests of the estate. *Druey v. Baldwin*, 473.
4. A witness who is incompetent to testify under the provisions of § 7871, subd. 2, Compiled Laws 1913, directly to the delivery of a deed by the deceased, is likewise incompetent to testify as to the possession of the same, where the purpose thereof is to establish that a delivery or nondelivery thereof must be inferred. *Druey v. Baldwin*, 473.
5. In an action of assault and battery, it is not prejudicial error to refuse testimony that the witness has been convicted of a criminal charge in a criminal action where it is not shown to the court or it does not appear that the purpose of such testimony is either to affect the credibility of the witness or to prove an admission against interest by a proof of a plea of guilty in a criminal action for the same assault and battery. *Engstrom v. Nelson*, 530.

**EVIDENCE—continued.**

6. Evidence in such action that a witness has entered a plea of guilty and has been convicted for the same assault and battery in a criminal action is admissible only as an admission against interest. *Engstrom v. Nelson*, 530.

**FRANCHISES.**

1. As it appears, the city of Bismarck granted to plaintiff's assignor a franchise to use the streets of the city of Bismarck to serve gas to the city and the people. The franchise did not fix the rates for gas, but it did clearly fix the highest rate that might be exacted. And the grantee agreed in writing to furnish gas at prices not to exceed the limited rate. There is no claim that the contract was made without consideration, or that it was effected by fraud, duress or imposition. Hence the gas company has no right to charge for gas any sum in excess of the limited rates. *Bismarck Gas Company v. District Court of Burleigh County*, 385.

**FIRES.**

1. The defendant appeals from a verdict and judgment for \$1,500 on the charge of permitting to escape from his land a prairie fire which caused the death of the plaintiff's husband. *Hogan v. Bragg*, 203.
2. In this case the prairie fire statute does not apply as there was no setting fire to woods, marsh, prairie or stubble. The fire was set to the bottom of an old straw stack in March when the ground was covered with snow and when there was not the least apparent danger. Such a fire is a matter of common and yearly occurrence on nearly every farm in the state, and the defendant was in no manner guilty of negligence in permitting the fire to escape after the lapse of twelve days and after a second snowstorm. *Hogan v. Bragg*, 203.

**FRAUD.**

1. Complaint examined and held to state an action for actual fraud and deceit. *Pratt v. Huber Mfg. Co.* 302.
2. A mistake of fact cannot be proved under an allegation of actual fraud. *Pratt v. Huber Mfg. Co.* 302.
3. Constructive fraud cannot be proved under an allegation of actual fraud. *Pratt v. Huber Mfg. Co.* 302.

**FRAUDULENT CONVEYANCES.**

1. In a transfer of certain land by deed from Largent, the owner, to one Patrick D. Norton, it is held that if fraud existed in procuring such transfer, Powell, the plaintiff, who had a mortgage upon the land conveyed by the deed, which mortgage was being foreclosed, not being a party to the conveyance of the land by deed from Largent to Norton, is in no position to

**FRAUDULENT CONVEYANCES—continued.**

assert fraud. If there were fraud in the procuring of the deed from Largent by Norton, it is a matter which can only be asserted by the parties to the transaction, in this case, Largent. *Powell v. International Harvester Company*, 220.

**GARNISHMENT.**

1. Under the laws of this state a garnishee action cannot be dismissed in advance of trial upon the motion of the defendant supported by affidavit, on the ground that the averments of the affidavit for garnishment are true. *Park, Grant & Morris v. Nordale*, 351.

**GUARANTY.**

1. The contract of guaranty upon which the suit is founded is held not to be ambiguous and, according to its terms, to be applicable to an existing account for goods previously sold as well as to goods sold subsequent to its execution. *Fargo Mercantile Company v. Johnson*, 534.

**HEALTH.**

1. Section 400 of the Compiled Laws of 1913, making it the duty of the board of health to make and enforce all needful rules and regulations for the prevention and cure of contagious diseases, is construed and held not to authorize the board of health to issue an order denying to children the right to attend the public schools except upon condition of being vaccinated, where it appears that there is no prevailing epidemic of smallpox and no imminent danger from this disease is reasonably to be anticipated. *Rhea v. Board of Education*, 449.
2. Sections 1346 and 426 of the Compiled Laws of 1913 defining the duties of school officers with reference to the supervision of health of school children and their exclusion from schools when infected with infectious or contagious diseases, are construed and held not to authorize the exclusion for nonvaccination, in the absence of a showing of danger due to the existence of smallpox in the community, or that such danger is reasonably imminent. *Rhea v. Board of Education*, 449.
3. Section 425 of the Compiled Laws of 1913, which provides for the vaccination of minors, and section 426, which enumerates the causes for which children may be excluded from schools, among which nonvaccination is not included, are construed together, and it is held that the reasonable construction is that children are not to be excluded from schools on the sole ground of nonvaccination. *Rhea v. Board of Education*, 449.



## HIGHWAYS.

1. By the county commissioners of McLean County an old highway crossing the land of defendant was relocated, surveyed and improved at great expense to the county, and for more than ten years defendant acquiesced in such relocation. Hence, it was entirely proper that he should be enjoined from committing a public nuisance by obstructing the highway. *McLean County v. Rathjen*, 73.

## HOMESTEADS.

1. Under § 2296, U. S. Rev. Stat. which provides that no land acquired under the homestead laws of the United States shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, a mechanic's lien which arises by operation of law upon the filing of a lien statement for building materials furnished does not attach to land acquired under the homestead laws, where the debt was contracted and the materials furnished before the patent was issued. *Bovey-Shute Lumber Co. v. Erickson*, 365.

## INSURANCE.

1. In an action brought to recover upon an accident policy of insurance in a fraternal benefit association, where the constitution and by-laws of the insurance association are made a part of the contract of insurance and the part of the constitution reads thus: "Class A, insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the result of bodily injury, hereinafter mentioned, effected through external, violent, or accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes,"—held, that the complaint failing to state that the death of the insured was the result of bodily injury through external, violent, and accidental means, was demurrable, and did not state a cause of action. *Dinnie v. United Commercial Travelers*, 42.
2. The contract of insurance contained a provision in substance that no action could be maintained upon the policy after the expiration of six months from the time of notice of disallowance of claims. This action was not brought within said six months period, but was brought within a year after notice of disallowance of claims. Held that the cause of action is not barred by the Statute of Limitations. *Dinnie v. United Commercial Travelers*, 42.

## JUDGMENTS.

1. Where a motion is made to set aside and vacate a judgment and such motion is not based upon an affidavit of merits, and there is no proposed veri-

## JUDGMENTS—continued.

- fed answer, and there is no fraud in the procuring of the judgment, it is clear abuse of discretion of the trial court to grant such motion setting aside and vacating the judgment. *Mougey v. Miller*, 81.
2. This is a motion to vacate a default judgment. The moving affidavits fail to excuse the default and the proposed answer fails to show any defense. *Fleming v. Williams*, 645.

## JURISDICTION.

1. The original jurisdiction of the supreme court may properly be invoked in a mandamus proceeding involving the right of possession of the office of superintendent of public instruction. *State of North Dakota ex rel. William Langer v. McDonald*, 389.

## JURY TRIAL.

1. One charged with such contempt is not entitled to a jury trial as a matter of right. And § 10,118, Comp. Laws 1913, providing for trial by the court, without a jury, on an inquiry for contempt, does not contravene the constitutional provisions relating to a trial by jury. *State of North Dakota v. Finlayson*, 494.

## LANDLORD AND TENANT.

1. Under the usual cropping contract, when the landowner is to have a share of the crop and the tenant or cropper a share, each party has at all times title to his share, and neither party has any right to sell or dispose of the share of the other party. *Fraine v. North Dakota Grain & Land Co.* 173.
2. In an action brought by a share cropper for the conversion of his share of grain raised upon land belonging to the defendant, the action having been seasonably brought and diligently prosecuted, it is held that the plaintiff is entitled to the highest market value of the property between the date of the conversion and the verdict. *Collard v. Fried*, 242.
3. The plaintiff brings this action to recover possession of a part of its right of way. In justice court and in district court the decision was given for the plaintiff, and defendant appeals. Manifestly the defendant held over contrary to the terms of his lease, which contained an express agreement that either party might terminate the same on written notice of thirty days. Judgment affirmed. *Northern Pacific Railway Company v. Bismarck Commission Company*, 490.
4. In the instant case plaintiff and defendant both claim to be lessees of a certain tract of land, and hence each claims to be the owner of certain hay grown thereon during the year 1917. Evidence examined and held:
- (a) That defendant had no lease for the premises for the season of 1917,

**LANDLORD AND TENANT—continued.**

nor was the lease which he held during 1916 renewed for the year 1917 by virtue of §§ 6094, 6095, and 6096, Compiled Laws, 1913. (b) That plaintiff has a valid lease and was and is the owner, and entitled to the possession of the hay gathered upon said premises during 1917. *Botnen v. Ecker*, 514.

**LIMITATIONS OF ACTIONS.**

1. For reasons stated in the opinion it is held that the contempt charged is not barred by the Statute of Limitations. *State of North Dakota v. Finlayson*, 494.

**MANDAMUS.**

1. The original jurisdiction of the supreme court may properly be invoked in a mandamus proceeding involving the right of possession of the office of superintendent of public instruction. *State of North Dakota ex rel. William Langer v. McDonald*, 389.

**MASTER AND SERVANT.**

1. In an action for personal injuries sustained by a pusher in a lignite coal mine, it is the duty of the master to furnish reasonably safe appliances and a reasonably safe place where the employee is instructed to be and work. *Abelstad v. Johnson*, 399.
2. In January, 1916, at Minot, the plaintiff was in the employ of defendant. His business was on the evening of each day to fill with coal the tender of a switching engine, by shoveling the same from a coal dock adjacent to the tender. By attempting to step from the tender onto the edge of a plank,—the near side of the coaling dock—and to walk the edge of the plank, the plaintiff lost his footing and fell some three feet between the coal dock and the tender, and was badly hurt. The plaintiff's injury was not caused by the negligence of defendant or of any of its employees, or by reason of any defect or insufficiency in its cars, engines, or appliances. Hence the plaintiff has no cause of action. *Vanevery v. Minneapolis, St. Paul & S. Ste. Marie R. Co.* 599.

**MECHANICS' LIENS.**

1. This is an action for the foreclosure of a mechanic's lien. The facts stated in the opinion show that the judgment in favor of plaintiff is clearly right and is affirmed. *McCaull-Webster Elevator Company v. Stiles*, 135.
2. Under § 2296, U. S. Rev. Stat. which provides that no lands acquired under the homestead laws of the United States shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the pat-

**MECHANICS' LIENS—continued.**

ent therefor, a mechanic's lien which arises by operation of law upon the filing of a lien statement for building materials furnished does not attach to land acquired under the homestead laws, where the debt was contracted and the materials furnished before the patent was issued. *Bovey-Shute Lumber Company v. Erickson*, 365.

**MORTGAGES.**

1. Where the owner of land executes a mortgage thereon to secure a note long past due at the time of the execution of the mortgage, and there is no new or independent consideration for the mortgage and no extension of time of payment of the note, and the payee has surrendered no existing legal rights, and there is no new note, payable on demand or at a future time, taken at the time of the execution and delivery of the mortgage, held that the wife of the mortgagor, who signed the mortgage with her husband, was merely a surety. *Maas v. Rettke*, 63.
2. And further, held that there was no consideration, so far as she was concerned, for the execution and delivery of the mortgage, it also appearing that she received no part of the consideration of the past due note which the mortgage was given to secure. *Maas v. Rettke*, 63.

**MUNICIPAL CORPORATIONS.**

1. As it appears, the city of Bismarck granted to plaintiff's assignor a franchise to use the streets of the city of Bismarck to serve gas to the city and the people. The franchise did not fix the rates for gas, but it did clearly fix the highest rate that might be exacted. And the grantee agreed in writing to furnish gas at prices not to exceed the limited rate. There is no claim that the contract was made without consideration, or that it was effected by fraud, duress, or imposition. Hence the gas company has no right to charge for gas any sum in excess of the limited rates. *Bismarck Gas Company v. District Court of Burleigh County*, 385.

**NEGLIGENCE.**

1. In January, 1916, at Minot, the plaintiff was in the employ of the defendant. His business was on the evening of each day to fill with coal the tender of a switching engine, by shoveling the same from a coal dock adjacent to the tender. By attempting to step from the tender onto the edge of a plank,—the near side of the coaling dock,—and to walk the edge of the plank, the plaintiff lost his footing and fell some 3 feet between the coal dock and the tender, and was badly hurt. The plaintiff's injury was not caused by the negligence of the defendant or of any of its employees, or by reason of any defect or insufficiency in its cars, engines or appliances. Hence the plaintiff. 41 N. D.—43.

## NEGLIGENCE—continued.

tiff has no cause of action. *Vanevery v. Minneapolis, St. Paul & S. Sta. Marie R. Co.* 599.

## NEGOTIABLE INSTRUMENTS.

1. A holder in due course of a promissory note must establish his good faith, as a matter of law, either by direct and uncontradicted testimony or by circumstances which show consistently the good faith of his purchase so that no fair-minded person can draw any other inference therefrom. *Sweet v. Anderson*, 375.
2. Where the plaintiff, claiming to be the bona fide holder of a promissory note in due course, does not testify that he purchased the same in good faith, and where the surrounding circumstances show that for several years prior thereto, he was the attorney for, and a stockholder in, the corporation named as payee in, and the indorser of said note, and was possessed necessarily or impliedly of such knowledge as might lead fair-minded men to draw different inferences concerning his good faith, the question of the good faith of such holder is for the jury. *Sweet v. Anderson*, 375.
3. This is an action on a promissory note of the Jamestown Gas Company. This note was given for the balance of an account due from the gas company to the plaintiff. It was made in the name of the company by one A. D. Grant, who was the general agent, general manager, secretary and treasurer of the company. It is held that Grant had ostensible authority to execute the note on behalf of the gas company. *MacKay v. Jamestown Gas Company*, 471.

## NEW TRIAL.

1. Defendant in due time made a motion for a new trial on the ground of newly discovered evidence. The motion was overruled, and in this there was no error. *State v. Hiertz*, 55.
2. Where a party invites, and in effect consents to, a ruling, he is ordinarily estopped from asserting that the ruling was prejudicial. *Chaffee Bros. Company v. Powers Elevator Company*, 94.
3. An order denying a new trial entered subsequent to the judgment cannot be reviewed on an appeal from the judgment. *Chaffee Bros. Co. v. Powers Elevator Company*, 94.
4. This is a personal injury suit in which plaintiff seeks to recover for an injury resulting from the alleged negligence of the defendants. For error in the instructions, the judgment is reversed and the case remanded for a new trial. *York v. General Utilities Corporation*, 137.
5. Under the provisions of § 8 of chapter 31 of the Laws of 1913, it will be presumed on appeal that a new trial was not granted on account of the insufficiency of evidence to support the verdict, unless the insufficiency or unsat-

**NEW TRIAL—continued.**

- lafactory nature of the evidence is expressly stated in a memorandum prepared by the trial judge. *Pratt v. Huber Mfg. Co.* 301.
6. Where a complaint is for actual fraud and the special findings negative such fraud, and the findings otherwise sufficiently cover the issues of the case, it is error to set aside a judgment rendered on such findings and to order a new trial. *Pratt v. Huber Mfg. Co.* 301.
  7. Defendant was convicted of grand larceny and sentenced to state's prison for not more than five years nor less than one year, and he appeals to this court. He assigns error based on objection and exceptions to the evidence and the charge to the jury. Held, the record shows no error and does show that defendant has had a fair trial. *State of North Dakota v. Dodds*, 326.

**PARENT AND CHILD.**

1. Although the usual presumption is that services rendered by a child to its parents are gratuitous, in the absence of an express contract therefor, nevertheless, where the circumstances are exceptional and the character of the services rendered peculiar, a contract may be implied to pay for such services. *Bergerson v. Mattern*, 404.

**PRINCIPAL AND SURETY.**

1. In such action a defendant surety, to avail itself of the defense of exoneration under § 6883, Compiled Laws 1913, requiring a creditor to proceed against the principal upon the requirement of the surety, must allege in its answer a reasonable notice and demand to proceed against the principal and prejudice resulting to the surety by reason of the failure of the creditor to do so. *Brioschi-Minuti Company v. Elson-Williams Construction Co.* 628.

**PUBLIC LANDS.**

1. Under § 2296, U. S. Rev. Stat. which provides that no lands acquired under the homestead laws of the United States shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, a mechanic's lien which arises by operation of law upon the filing of a lien statement for building materials furnished, does not attach to land acquired under the homestead laws, where the debt was contracted and the materials furnished before the patent was issued. *Bovey-Shute Lumber Co. v. Erickson*, 365.

**QUIETING TITLE.**

1. In an action to determine adverse claims, where the executor and the heirs

**QUIETING TITLE—continued.**

at law of the estate of the deceased are parties thereto, and the findings of the trial court are in favor of the estate, the judgment thereupon should quiet title in the heirs at law, and in the executor for purposes of administration. *Druey v. Baldwin*, 473.

2. In an action to determine adverse claims, where the plaintiff asserts a title as vendee, under a contract for a deed, and where the appellant under a general denial seeks to defeat the title of the plaintiff by reason of a resulting trust and a conveyance made to defraud creditors, it is incumbent upon the appellant to establish such resulting trust of conveyance made to defraud creditors by clear, substantial and satisfactory proof. *Bernauer v. McCaull-Webster Elev. Co.* 561.
3. Held, under the evidence, that the trial court properly denied title in the plaintiff, as vendee, in a contract for a deed as against the claims of the appellant herein, asserting liens upon the premises involved made by a third party to whom the appellant asserted that the title in such contract for a deed inured by reason of a resulting trust, or by reason of the conveyance having been made to defraud creditors. *Bernauer v. McCaull-Webster Elevator Co.* 561.

**RAILROADS.**

1. The Board of Railroad Commissioners have no general or inherent powers authorizing them to require railroad companies to establish stations at places not possessing the requisites described in the statutes. *Aandahl v. Great Northern Railway Company*, 577.
2. Section 4656 of the Compiled Laws of 1913 does not authorize the establishment of a new station within 5 miles of another station established in this state. *Aandahl v. Great Northern Railway Company*, 577.
3. Where a railroad company establishes a stopping place for receiving and discharging passengers, the Railroad Commissioners have authority to require the construction and maintenance of a platform and building sufficient for the accommodation of such traffic. *Aandahl v. Great Northern Railway Company*, 577.
4. Held, by a majority of the court, that the evidence in the instant case is insufficient to show that a stopping place has been established and advertised by the railroad company. *Aandahl v. Great Northern Railway Company*, 577.

**RECORDS.**

1. The purpose of the registration statute is merely to give subsequent purchasers and creditors a ready means of seeing the records of prior conveyances. When a person is in possession under a conveyance, or where a party has actual or constructive notice of the same, then the recording statute

**RECORDS—continued.**

does not apply. Good faith means good faith; it means an honest intention to abstain from taking an unconscientious advantage of another, even through the forms and technicalities of the law. *Mueller v. Bohn*, 537.

**SALES.**

1. In an action for the recovery of damages for breach of warranty in the sale of ewes, which warranty related to the time when the ewes would lamb, it is held that there is ample evidence from which the jury could find an express warranty. *McCurdy v. Aylor*, 187.

**SCHOOLS AND SCHOOL DISTRICTS.**

1. In an action brought by citizens and taxpayers residing within an area affected by the proceedings of a board of directors of a special school district annexing territory to the district, it is held that a complaint which alleges the nonexistence of facts required to give the school board authority to enlarge the district states a cause of action. *Weiderholt v. Lisbon Special School District*, 146.
2. The legality of proceedings of a school board in reforming a district by adding territory thereto, which could have been tested at the common law by a writ of quo warranto or by information in the nature of quo warranto may be tested in this state by a civil action in the district court under § 7969 of the Compiled Laws of 1913. *Weiderholt v. Lisbon Special School District*, 146.
3. Section 400 of the Compiled Laws of 1913, making it the duty of the board of health to make and enforce all needful rules and regulations for the prevention and cure of contagious and infectious diseases, is construed and held not to authorize the board of health to issue an order denying to children the right to attend the public schools except upon condition of being vaccinated, where it appears that there is no prevailing epidemic of smallpox and no imminent danger from this disease is reasonably to be anticipated. *Rhea v. Board of Education*, 449.
4. Sections 1346 and 426 of the Compiled Laws of 1913, defining the duties of school officers with reference to the supervision of the health of school children and their exclusion from school when infected with infectious or contagious diseases, are construed and held not to authorize the exclusion for nonvaccination, in the absence of a showing of danger due to the existence of smallpox in the community, or that such danger is reasonably imminent. *Rhea v. Board of Education*, 449.
5. Section 425 of the Compiled Laws of 1913, which provides for the vaccination of minors, and § 426, which enumerates the causes for which children may be excluded from school, among which nonvaccination is not included, are construed together, and it is held that the reasonable construction is



**SCHOOLS AND SCHOOL DISTRICTS—continued.**

that children are not to be excluded from schools on the sole ground of vaccination. *Rhea v. Board of Education*, 449.

6. Where a statutory law imposes upon school boards the mandatory duty of requiring each child between the ages of six and fifteen years of age to attend the public school for a specified time during each school year, and in that respect imposes a further mandatory duty upon the school board requiring it to provide transportation to the school for all children between the ages of six and fifteen years of age, inclusive, who reside beyond the specified distance as prescribed by law when it becomes the mandatory duty of the school board to provide conveyance for such children to such school, it is the mandatory duty of the school board to ascertain and determine what children within the district reside beyond such specified distance from the school, and convey them to school in accordance with the requirement of the law providing for such transportation. *Eastgate v. Osago School District*, 518.
7. Where the school board fails, neglects, or refuses to furnish transportation for children between the ages of six and fifteen years, inclusive, in disregard of the provisions of law which make it their mandatory duty to do so, and where the parent or guardian or one lawfully charged with the custody and care of such children conveys them to the nearest properly equipped school within the district by the nearest public or lawfully traveled route, such service being accepted by the school district, the district is under an implied contractual obligation to compensate therefor. *Eastgate v. Osago School District*, 518.
8. In an action to recover for labor and materials furnished the complaint alleged that the plaintiffs erected a schoolhouse which was needed for the accommodation of the school children of the defendant district; and that such action was taken by plaintiffs following an adverse vote at two separate elections on the proposition of bonding the district for the purpose of erecting a schoolhouse to take the place of a building which had been condemned by the board of health; held, that the complaint does not state a cause of action. *Henderson v. Long Creek School District*, 640.
9. Section 1184 of the Compiled Laws of 1913 authorized boards of directors of common school districts to erect schoolhouses only when directed to do so by a majority of the voters of the district. *Henderson v. Long Creek School District*, 640.
10. Where a statute limits the powers of boards of directors of common school districts as to erection of schoolhouses, and prescribes that such powers can only be exercised by first procuring authority from the voters, and where such board, not having obtained the requisite authority, refused to enter into a contract for the construction of a schoolhouse, the district is not rendered liable as upon contract by acceptance of a building so constructed without authority. *Henderson v. Long Creek School District*, 640.

**SET-OFF AND COUNTERCLAIM.**

1. Where a defendant had found it necessary to employ counsel to defend a conveyance made by the plaintiff to the defendant against the charge that such conveyance was fraudulent as to creditors of the plaintiff, he is not entitled in a subsequent suit, to establish as a counterclaim the amount paid in defense of the suit. *Collard v. Fried*, 242.
2. Where, in previous litigation to which plaintiff and defendant were parties defendant, an account existing between them was litigated and formed the basis for determining the amount owing by one to the other, the account is *res judicata* and cannot subsequently be made the basis of a counterclaim. *Collard v. Fried*, 242.

**SHERIFFS AND CONSTABLES.**

1. Under chapter 275, Laws 1911, relating to salaries of sheriffs and providing for fees collected by sheriffs to be turned into the county treasurer it is held: that a sheriff is required to turn over to the county treasurer (a) all fees collected in making real estate mortgage foreclosure sales by advertisement; and (b) all fees received under § 2178, *Compiled Laws*, for collecting personal property taxes. *County of Stutsman v. Wright*, 167.
2. That a sheriff is not required to turn over to the county treasurer fees received for making sales upon the foreclosure of chattel mortgages by advertisement. *County of Stutsman v. Wright*, 167.

**SPECIAL VERDICT.**

1. Special verdict of the jury examined and its findings held not to be inconsistent. *Pratt v. Huber Mfg. Co.* 301.
2. The failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact, and this whether the party be the plaintiff or the defendant. *Boulger v. Northern P. R. Co.* 316.
3. Where the special verdict of a jury finds that the injury to plaintiff's property, which was flooded by surface waters, was, if due at all, to the obstructing of such waters by the defendant's railroad embankment and the flooding back therefrom, and was also due to the waters rushing down hill and running into the basements before they even reached such track, and does not determine how much damage was occasioned by each of the causes, no recovery against the defendant can be had on such a verdict. *Boulger v. Northern Pacific R. Co.* 316.

**SPECIFIC PERFORMANCE.**

1. Plaintiff brought action against the defendant to compel defendant to convey to plaintiff by warranty deed certain lands in pursuance to the terms

**SPECIFIC PERFORMANCE—continued.**

of a certain contract for deed, the terms of which had been fully performed by the plaintiff, and the provisions of which entitled him to a deed upon full performance of the conditions therein. Plaintiff tendered to defendant the full amount due on said contract on January 4, 1917, in the sum of \$2,253.94. Defendant claimed that the amount tendered was not sufficient to pay the balance due on the contract price of the land; held, that the plaintiff's tender was sufficient in form and amount, and entitled him to the warranty deed for the land. *Langton v. Kops*, 442.

**STATUTE OF FRAUDS.**

1. In an action brought to charge the defendant for goods delivered to a third person, where the plaintiff testified that the defendant told him that he would see that he, the plaintiff, got his pay, the goods being charged to the third person to whom they were delivered, the evidence examined and held to establish a promise to pay for the debt, default, or miscarriage of another within the Statute of Frauds. *Gidley v. Glass*, 542.

**STATUTES.**

1. Section 4656 of the Compiled Laws of 1913 does not authorize the establishment of a new station within 5 miles of another station established in this state. *Aandahl v. Great Northern R. Co.* 577.

**TAXATION.**

1. Section 2110, Comp. Laws 1913, relating to taxation of domestic corporations and associations, provides that every such corporation and association shall be assessed for the amount which its paid up capital stock (as determined by the market value thereof, if it has market value, and if it has no market value, then by its actual value), exceeds the aggregate of the values of the real and personal property owned, and the amount of the total indebtedness (except current expenses), owed, by such corporation or association. Held, that an assessment against a domestic corporation under the rule prescribed by this section does not take the property of such corporation without due process, or deny to it the equal protection of the laws, even though all of its tangible property is located outside of the borders of the state. Held, further, that such assessment does not infringe upon any rights guaranteed to such corporation by § 9, article 1, of the Federal Constitution, or by § 16 of the Constitution of North Dakota. *Grand Forks County v. Cream of Wheat Co.* 330.
2. The state tax commission, being a board created by legislative enactment, possesses such powers only as the legislature has expressly conferred upon it. *Wallace v. Hughes Electric Co.* 418.
3. The power conferred upon the state tax commission by subdivision § 2088,

**TAXATION—continued.**

- Compiled Laws 1913, to summon witnesses to appear and give testimony and produce records, books, papers and documents is not an arbitrary or unlimited power, but one to be exercised and within proper limits. *Wallace v. Hughes Electric Co.* 418.
4. In order to justify the entry of an order by a district court, under § 2089, Compiled Laws 1913, to compel obedience to an order of the state tax commission for the appearance of witnesses and the production of records, books, and documents, it must appear that the order was made in some matter before, and within the jurisdiction of the tax commission, and that there was some reasonable basis for the action of the tax commission. *Wallace v. Hughes Electric Co.* 418.
  5. It is held that the petition in the instant case fails to state facts sufficient to justify the entry of an order, by a district court, to compel witnesses to appear and give testimony and produce records, books, and documents before the state tax commission. *Wallace v. Hughes Electric Co.* 418.
  6. A stipulation fairly made, relating to the conduct of a pending case, will not be set aside where such action would be likely to result in serious injury to one of the parties thereto. *Trott v. State of North Dakota*, 614.

**TELEGRAPHS AND TELEPHONES.**

1. The evidence is examined and held to support the verdict of the jury, holding the defendants liable for the negligence of a member of the association organized for the purpose of constructing and operating a rural telephone line. *Meyer v. Burch*, 18.

**TENDER.**

1. Plaintiff brought action against the defendant to compel defendant to convey to plaintiff by warranty deed certain lands in pursuance to the terms of a certain contract for deed, the terms of which had been fully performed by the plaintiff, and the provisions of which entitled him to a deed upon full performance of the conditions therein. Plaintiff tendered to defendant the full amount due on said contract on January 4, 1917, in the sum of \$2,253.94. Defendant claimed that the amount tendered was not sufficient to pay the balance due on the contract price of the land; held, that the plaintiff's tender was sufficient in form and amount, and entitled him to the warranty deed for the land. *Langton v. Kops*, 442.

**TREATIES.**

1. A treaty made under the authority of the United States and within the scope of the legitimate powers vested by the Constitution is the supreme law of the land; its provisions supersede and render nugatory all conflicting provisions in the laws or constitution of any state; and in case

**TREATIES—continued.**

such conflict arises it is the duty of the judges of every state to uphold and enforce the treaty provisions. *Trott v. State of North Dakota*, 614.

2. The treaty between the United States and Great Britain (Act March 2, 1899, 31 Stat. at L. 1939), which provides that the citizens or subjects of each of the contracting powers may dispose of their personal property within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees being citizens of the contracting portion, whether residents or nonresidents, shall succeed to their said personal property, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases, renders nugatory, as to citizens or subjects of Great Britain, the provisions of the North Dakota Inheritance Tax Law, which imposes upon nonresident aliens a larger tax than that imposed upon citizens or resident aliens; and the citizens or subjects of Great Britain are chargeable only with the same tax as that chargeable against citizens and resident aliens. *Trott v. State of North Dakota*, 614.

**TRIAL.**

1. Where a defendant appears before a district judge in response to a summons and tries the issues involved in a suit to enjoin him from trespassing upon the land of the plaintiff, and cutting, harvesting, threshing or marketing crops growing thereon, and makes no objection to the form of the action or the method of trial, he cannot upon appeal, contend that the action, so far as it involves a right of possession of land, should have been tried to a jury. *Goss v. Lindeberg*, 99.
2. Where a defendant through mistake, inadvertence, or excusable neglect fails to demand a change of place of trial and to interpose an answer within the time prescribed by law, the trial court may upon proper showing relieve the defendant from his default, both as regards the failure to answer and failure to demand a change of place of trial. *Price v. Willson*, 209.
3. The failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact, and this whether the party be the plaintiff or the defendant. *Boulger v. Northern P. R. Co.* 316.
4. Where the special verdict of a jury finds that the injury to plaintiff's property, which was flooded by surface waters, was, if due at all, to the obstructing of such waters by the defendant's railroad embankment and the flooding back therefrom, and was also due to the waters rushing down hill and running into the basements before they even reached such track, and does not determine how much damage was occasioned by each of the

**TRIAL—continued.**

- causes, no recovery against the defendant can be had on such a verdict. *Boulger v. Northern P. R. Co.* 316.
5. In trials under the Newman Act it is the duty of attorneys to carefully refrain from encumbering the record with incompetent, immaterial, or irrelevant testimony, and the trial court may properly indicate during the course of the trial its views when the attorneys are so doing. *Druey v. Baldwin*, 473.
  6. Where an action properly triable by a jury is tried to the court without a jury, the supreme court will not try the case *de novo* but the findings of the trial court are presumed to be correct. Appellant has the burden of showing error, and a finding based upon parol evidence will not be disturbed, unless shown to be clearly opposed to the preponderance of the evidence. *Botnen v. Eckre*, 514.
  7. Where, during the trial of a case, the trial court announced a theory of the issues at variance with the issues as framed by the pleadings, and rulings were made upon the admission of testimony in accordance with such theory, a purpose having been evinced to conduct the trial according to the erroneous theory of the issues, it is held that, under the circumstances, such rulings constitute prejudicial error entitling the party adversely affected to a new trial. *German-American State Bank of Balfour v. Erickson*, 548.
  8. Where a party adversely affected by rulings of the trial court excepts to the rulings, and abandons the trial, and is not required by the trial court to continue, he does not waive the errors. *German-American State Bank v. Erickson*, 548.

**TRUSTS.**

1. In an action to determine adverse claims, where the plaintiff asserts a title as vendee, under a contract for deed, and where the appellant under a general denial seeks to defeat the title of the plaintiff by reason of a resulting trust and a conveyance made to defraud creditors, it is incumbent upon the appellant to establish such resulting trust or conveyance made to defraud creditors by clear, substantial, and satisfactory proof. *Bernauer v. McCaull-Webster Elevator Co.* 561.

**UNDERTAKINGS.**

1. An undertaking on appeal, sufficient to operate as a supersedeas under the provisions of § 7825 of the Compiled Laws of 1913, which recites the appeal from an order refusing to vacate a judgment as well as the appeal from the judgment itself, and which is conditioned for the payment of damages and costs and for the payment of the judgment, if either the judgment or the order appealed from is affirmed, is a sufficient undertak-

## UNDERTAKINGS—continued.

ing to support the appeal from the order and the judgment. *Fargo Silo Co. v. Pioneer Stock Co.* 345.

## USURY.

1. Under § 6076 of the Compiled Laws of 1913, declaring that the charging of a rate of interest greater than that allowed by the statutory provisions therein specified, when knowingly done, shall be deemed a forfeiture of the entire interest, and providing that, in case the greater rate has been paid, the person paying it may recover back in an action for that purpose twice the amount of interest thus paid from the person who had taken or received it, provided such action is commenced within two years from the time the usurious transaction occurred, a cause of action for the penalty arises only when interest has actually been paid. *Lindeberg v. Burton*, 587.
2. The statute contemplates an actual payment, and not merely a further promise to pay. Interest is not "paid," within the meaning of the statute, by the giving of a renewal note or notes. *Lindeberg v. Burton*, 587.
3. The remedy provided by the statute is exclusive. *Lindeberg v. Burton*, 587.
4. A party who seeks to recover the penalty prescribed by section 6076, supra, must bring himself within its provisions, and must allege, and prove, among other things, that he has actually paid interest upon a usurious contract. *Lindeberg v. Burton*, 587.

## VENDOR AND PURCHASER.

1. In a written contract for the exchange of property where the defendants exchanged a quarter section of land at the agreed price of \$40 an acre with the plaintiff for his certain stock of merchandise, the balance of the purchase price of land being settled for by taking plaintiff's promissory notes, and such written contract among other provisions contained the following clause: "We further agree within one year from date to find a buyer for said land at a price not less than \$40 per acre to said Joseph Boxell;" held, that the same constituted a binding covenant on the part of the defendants to sell the land within one year. If the defendants failed to do so, they were liable in damages for the difference between the reasonable value of the land and \$40 per acre. After the expiration of one year plaintiff sold the land for \$5,080, and the proof is sufficient to show that that was the reasonable value of the land at the time plaintiff sold it; that the measure of damages was the difference between that sum and \$40 per acre; that the above clause in the contract was relied upon by the plaintiff and to him constituted an inducement to make the contract. It was one of the principal elements of it, and was not, as claimed by defendant, a mere broker's agreement. *Boxell v. Grant*, 566.

**WATERS AND WATERCOURSES.**

1. Special verdicts of the jury examined and found not to be inconsistent. *Boulger v. Northern P. R. Co.* 316.
2. The waters of a slough that has existed for over thirty-five years with waters remaining therein almost constantly, in extent covering 40 acres, more or less, being natural depression for the reception of the surface waters of the tributary adjacent watershed for which there is no natural outlet, are not to be treated as surface waters, even though the supply thereof is exclusively from surface waters. *Froemke v. Parker*, 408.
3. A runway or draw, naturally serving to drain off the surface waters of a tributary watershed occasioned by the winter's snow or the spring rains, serving this purpose only temporarily, though periodically, otherwise used and being capable of use for agricultural purposes, is not a watercourse. *Froemke v. Parker*, 408.
4. Such draw or runway is simply a natural drainway for the surface waters of the watershed that it serves. The lower landowner over whose land such natural drainway exists has no legal ground of complaint to the reception of the surface waters in such drainway from the tributary watershed as they were accustomed to come in a state of nature. *Froemke v. Parker*, 408.
5. Where the owner of the land upon which such slough is located has constructed a tile drain from such slough to such drainway some 1,800 feet in length, the purpose and effect of which is to drain off the waters therein upon and through such drainway to the damage of the lower landowners, no legal right exists to do so, and injunction will lie to prevent the maintenance of such tile drain. *Froemke v. Parker*, 408.
6. Held, under the facts, that there is no question presented for the application of either the civil law rule or the common enemy rule concerning surface waters. *Froemke v. Parker*, 408.

**WILLS.**

1. Subdivision 3 of § 5649, Comp. Laws 1913, is as follows: "The testator must at the time of subscribing or acknowledging the same declare to the attesting witness that the instrument is his will;" held, that the word "declare" as therein used does not mean that the testator must declare by spoken words that the instrument is his will, but such declaration may be made by other means than the use of spoken words, such as the use of signs, gestures, or any other means by which the testator can convey and make known to the witnesses that the instrument which he signed is his will. The word "declare," as thus used, means to make known, to signify, to show in any manner either by words or acts. *Edwardson v. Gerwien*, 506.
2. Where one is contesting proof of a will on the ground that the testator at the time of making the will was possessed of certain insane delusions, it



**WILLS—continued.**

is not sufficient to introduce evidence which tends to prove the testator was possessed of such delusions. There should be further proof by the contestant to the effect that such alleged insane delusions have no foundation in fact or probability, in order to show that the delusion is wholly a product of the imagination; held in this case there is a failure of proof, there being no testimony introduced to show that the insane delusions alleged to have been possessed by the testator had no basis in fact or probability. *Edwardson v. Gerwien*, 506.

**WITNESSES.**

1. It is held that the petition in the instant case fails to state facts sufficient to justify the entry of an order, to compel witnesses to appear and give testimony and produce records, books, and documents before the state tax commission. *Wallace v. Hughes Electric Co.* 418.
2. Evidence that a witness has been convicted of a crime is admissible in a civil action of assault and battery, only for the purpose of affecting his credibility. *Engstrom v. Nelson*, 530.

**TERMS OF COURT, CHAMBERS,**

**AND**

**RULES OF PRACTICE**

**FOR THE**

**Supreme Court and the**

**District Courts**

**OF THE**

**State of North Dakota**

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**Adopted by the Supreme Court June 26, 1920**

**Effective August 15, 1920**

# **SUPREME COURT OF NORTH DAKOTA**

**1920.**

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## **CHIEF JUSTICE.**

**A. M. Christianson.....Towner, N. D.**

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## **ASSOCIATE JUSTICES.**

**L. E. Birdzell.....Grand Forks, N. D.**

**H. A. Bronson.....Grand Forks, N. D.**

**R. H. Grace.....Mohall, N. D.**

**J. E. Robinson.....Fargo, N. D.**

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## **REPORTER.**

**Joseph Coghlan.....Grand Forks, N. D.**

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## **CLERK.**

**J. H. Newton.....Williston, N. D.**

## CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE TO SUPREME COURT.

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### CONCERNING DUTIES, PROCEDURE AND RULES.

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#### CONST. SEC. 86, ART. 4—

"The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

#### CONST. SEC. 93, ART. 4—

"There shall be a clerk and also a reporter of the supreme court, who shall be appointed by the judges thereof, and who shall hold their offices during the pleasure of said judges, and whose duties and emoluments shall be prescribed by law and by the rules of the supreme court not inconsistent with law."

#### CONST. SEC. 109, ART. 4—

"Writs of error and appeals may be allowed from the decisions of the district courts to the supreme court under such regulations as may be prescribed by law."

#### SEC. 7342, C. L. 1913—

"Said court is vested with full power and authority necessary for the carrying into complete execution all its judgments, decrees and determinations in the matters aforesaid and for the exercise of its jurisdiction as the supreme judicial tribunal of the state; and shall by order made at general or special terms from time to time make and prescribe such general rules and regulations for the conduct and hearing of causes in said court not inconsistent with the statute law of the

state, as it may deem proper; and the said court by order prescribe the manner of publication at the expense of the state of such rules and regulations; and the same shall not be in force until thirty days after the publication thereof."

**SEC. 7340, C. L. 1913—**

"The supreme court shall be always open for the issue and return of all writs and process which it may lawfully issue and for the hearing and determination of the same, subject to such regulations and conditions as the court may prescribe."

**CH. 225, LAWS 1917—WRITS OF ERROR—**

"The supreme court of the State of North Dakota shall have authority to prescribe rules for the issuance of Writs of Error to inferior courts of this state, to enforce the due administration of justice in all matters within its jurisdiction."

**CH. 7, LAWS 1919—ABSTRACTS AND BRIEFS—**

"Upon any appeal to the Supreme Court it shall not be necessary to file or use any printed abstract or statement of the case, but in lieu thereof, the Appellant shall cause to be filed in the Lower Court and returned to the Supreme Court, with the other record, two copies in addition to the original, of the statement of the case as settled and certified. The Supreme Court shall prescribe by rule or regulation the manner in which, and the time within which, briefs shall be prepared and filed, and for the allowance of costs in respect to the same."

**CH. 8, LAWS 1919—APPEALS IN CASES TRIED WITHOUT JURY.**

"On appeal in the Supreme Court in any action tried by the Court, but without a jury, if it appear to the Court that any material evidence was excluded, the Court may issue a mandate to the Trial Court to take such evidence without delay, and to certify and return it to the Supreme Court, and all proceedings in the Supreme Court shall be stayed pending the return of such evidence."

**CH. 1, LAWS 1919—CHANGES OF JUDGES IN DISTRICT COURT.**

(For Prejudice or Bias.)

"When either party to a civil action pending in any of the District Courts of the State shall after issues joined and before the opening of

any regular, special or adjourned term at which the cause is to be tried file an affidavit stating that he has reason to believe and does believe that he cannot have a fair and impartial trial or hearing before the Judge of the District Court by reason of the prejudice or bias of such judge, the Court shall proceed no further in the action and shall thereupon be disqualified to do any further act in said cause."

(The Supreme Court to Designate Trial Judge.)

"The Supreme Court shall upon receipt of such affidavit of prejudice from the Clerk of the District Court, designate a District Judge to act in the place and stead of the Judge disqualified."

**CH. 212, LAWS 1919—TERMS OF SUPREME COURT.**

"The Supreme Court shall prescribe by rule or regulation the time and manner in which the general and special terms thereof shall be held."

**CH. 212, LAWS 1919—CALENDAR.**

"All cases pending in the Supreme Court on appeal or otherwise, shall be placed on the calendar of such Court and be liable to call for argument and for final disposition in such manner and at such time as the Supreme Court may by rule or order prescribe."

**CH. 167, LAWS 1919—TERMS IN DISTRICT COURT.**

"The terms of court to be held in each county, in the several judicial districts and the location of the judges' chambers shall be fixed by order of the Supreme Court in such manner that the judges in each judicial district may have a circuit within their district and so that no judge shall hold two consecutive jury terms of court in any county in his district, except in the County of Cass."

**CH. 167, SEC. 6, LAWS 1919—RULES FOR DISTRICT COURT.**

"The Supreme Court shall, in the exercise of its supervisory control over district courts, adopt uniform rules of procedure for all of the district courts in each of the several judicial districts within the state."

## **RULES OF PRACTICE OF THE SUPREME COURT OF NORTH DAKOTA.**

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**RULE 1. FEES.** Upon the filing of a record or any papers in an appeal or in an original proceeding in this court, the appellant or petitioner shall deposit with the clerk \$10.00 to apply on fees; provided, that no fees shall be required in habeas corpus proceedings.

**RULE 2. TERMS.** General terms of the Supreme Court shall be held monthly at the State Capitol, commencing on the first Tuesday of each month, excepting the months of July and August. Special terms may be held at such times and places as may be designated upon ten days' prior notice thereof.

**RULE 3. SUBMISSION OF CASES.** A case shall be considered ready for submission upon the calendar whenever the record therein has been on file with the clerk for a period of at least fifteen days, before a general or special term.

**RULE 4. CALENDAR.** On the tenth day prior to a general or special term, the clerk shall prepare a calendar of the causes to be heard during such term, which calendar shall state the title, calendar number, docket number, the names of the respective counsel, the court from which the appeal is taken, and the date set for the argument thereof. The Clerk shall thereupon notify counsel, whose names appear upon such calendar, concerning the date of hearing their respective cases.

**RULE 5. CONTINUANCE.** Cases appearing upon the proposed calendar may be continued for cause, only by order of court, upon motion or stipulation.

**RULE 6. ORAL ARGUMENT—**

(A) **TIME ALLOWED.** Upon oral argument, the appellant shall be allowed, for his opening and closing argument, one hour, and the

respondent shall be allowed forty-five minutes, unless upon written application, made and filed before the day of the argument, the time for cause, shall be extended.

Upon motions, the counsel will be limited to fifteen minutes on each side, unless otherwise directed by the Court.

(B) **WHEN NOT ALLOWED.** In actions upon contracts, or in equity, where the amount involved upon appeal does not exceed \$200.00 and in appeals involving only questions of practice, or taxation of costs, no oral argument will be permitted, unless prior to the day of submission, upon application in writing made, the court shall so order.

(C) **SUBMISSION WITHOUT ORAL ARGUMENT.** Whenever a cause on appeal is placed upon the calendar for oral argument, and, at the time of the call of such cause a party fails to appear, the cause, on his part, shall be submitted without oral argument.

Either party, at any time, may submit the cause on appeal, on his part, without oral argument. . .

**RULE 7. FILING OF BRIEFS.** Upon appeal to the Supreme Court, the appellant shall fully prepare his brief and serve it upon the respondent, and file it with the clerk of the court from which the appeal is taken before or at the time the record of the case is transmitted to the Supreme Court, by the clerk of the District Court, and it shall be transmitted with such record.

Within fifteen days after the service of the appellant's brief, upon the respondent, as aforesaid, the respondent shall prepare his brief, and serve it upon appellant, and file it with the Clerk of the Supreme Court.

Failure of the appellant to comply with this rule will subject the appeal to dismissal, unless the Supreme Court for sufficient cause, should otherwise order.

**RULE 8. BRIEFS. (A) *How Prepared.*** The briefs of the parties shall be prepared upon good white or yellow unglazed paper, properly paged. If typewritten each sheet shall be 11 inches in length and 8½ inches in width with marginal lines thereupon. Such sheet shall be legibly typed upon one side. The typed matter within marginal lines, duly proportioned on each sheet, shall occupy not to exceed 9½ inches in length and 5½ inches in width. If printed, each sheet shall



be 10½ inches in length and 7 inches in width. The printed page, with proportionate margins, shall not exceed 8 inches in length and 4 inches in width.

(B) *Contents.* The appellant shall set forth in the brief, viz:—

1. The pleadings necessary to understand the nature of the case.
2. The issues.
3. The nature of the appeal.
4. The specifications of error.
5. A concise statement of the facts pointing out specifically the page and line in the settled case, in verification of each statement so made.
6. The ultimate facts set forth separately.

These ultimate facts, as stated by the appellant, shall be set forth on a separate page and separately indexed. Specifications of errors may be assigned in groups. Upon these specifications, the appellant shall separately state his points, argument, and citations of authorities.

The respondent, in his brief, following the order of the appellant, shall state separately, upon such specifications, his points, argument and citations of authorities.

Where the statement of facts is controverted, the respondent, likewise, shall make a concise statement of the facts. The respondent likewise shall prepare a statement of the ultimate facts, separately set forth and separately indexed. Reply and supplemental briefs may be filed by permission of the court when prepared in accordance with the foregoing rules. All briefs shall be fully indexed.

(C) *Cover.* The briefs shall have good and sufficient covers upon which shall be indicated the title, the nature of the appeal, from what court and judge, and the respective counsel for each of the parties.

(D) *Filing.* Seven copies of briefs, if typewritten, and nine copies, if printed, shall be filed.

**RULE 9. APPLICATION FOR ORIGINAL WRITS OR ORDERS.** All applications for writs or orders of this court, in the exercise of its original jurisdiction, shall be made by filing seven copies of the moving papers, accompanied by a brief upon the law, including citations of authorities.

**RULE 10. ORIGINAL WRITS OR ORDERS.** Upon application for original writs or orders to show cause, the court, in its discretion, may issue an order to show cause, or may direct an alternative writ to be issued by the clerk returnable at a time deemed proper.

**RULE 11. WRITS.** All writs issued from or out of this court shall be signed by the clerk, sealed with the seal of the court, and attested upon the day issued.

**RULE 12. PROCEEDINGS IN EXERCISE OF ORIGINAL JURISDICTION.** In original causes, whether in response to an order to show cause, or an alternative writ of any kind, the respondent shall appear by (a) written motion to quash, (b) demurrer, or, (c) answer and return.

These may be submitted to the Court without waiver at one or different times, as may best suit the convenience of the Court, and the parties, for purposes of expedition.

Upon a hearing, the parties may present, in support of the issues, affidavits and counter affidavits.

If, for the determination of controverted facts, a further hearing and additional evidence becomes necessary, this court, upon application made therefor, shall determine the method of taking, and the time for the return of, additional testimony, whether the same be, by additional evidence, by deposition, or by oral testimony taken before this court, or, by reference, either to a trial court, or some designated commissioner or referee.

**RULE 13. AFFIRMANCE OR DISMISSAL UPON DEFAULT.** The respondent may apply to the court for affirmance or dismissal of a cause, as the case may be, if the appellant shall fail or neglect to serve and file the record, or his brief, as required by law, or by these rules.

However, for the default of the respondent, no reversal will be ordered unless the record presents reversible error.

**RULE 14. OPINIONS OF COURT TO PARTIES.** Whenever a decision in a case is filed and announced by the clerk, a copy of the written opinion, including the dissenting opinions, if any, on file, shall be mailed to the respective counsel of the parties.

**RULE 15. RE-HEARING.** A petition for re-hearing may be filed if accompanied by seven copies of such petition, at any time within fifteen

days after the decision in the case is filed. In all cases, the remittitur shall be stayed until the expiration of the time for the filing of petitions for re-hearing, or until the petition therefor shall be denied, unless this court shall otherwise order.

**RULE 16. PETITIONS FOR RE-HEARING; FORM OF.** All petitions for re-hearing must be legibly typewritten or printed, and must conform to the general rules concerning the preparation of briefs. A copy of the same shall be served upon the opposing counsel at the time of filing with the Clerk.

Such petitions must not be a re-statement or re-argument of matters contained in the brief, but must distinctly point out the error complained of in the decision rendered, the statutory provisions of law, or the controlling principles of law overlooked or not called to the attention of the court, upon the argument or in the briefs.

**RULE 17. TAXATION OF COSTS.** In all cases originating in this court the costs and disbursements will be taxed by the clerk of this court. In other cases the costs and disbursements of both courts (except the fees of the clerk of this court, which shall be taxed by him without notice) shall be taxed in the District Court after the remittitur is there filed, and the amount as taxed shall be inserted in the judgment of the court below. In civil cases the remittitur will not be transmitted until the fees of the clerk of this court shall first have been paid. In all cases where parties are dissatisfied with any bill of costs taxed by the clerk of this court, costs will be informally retaxed at any time on application.

**RULE 18. EXECUTION FOR COSTS.** Executions signed by the clerk, sealed with the seal of this court, attested as of the day when the same was issued, may issue out of this court to enforce any judgment for costs made and entered in cases which originate in this court. Such executions may issue and be directed to the Marshal, or to the Sheriff of any County, and may be enforced in any county in the state in which a transcript for such judgment for costs is filed and docketed.

**RULE 19. RECORD ON APPEAL.** (A) *From Judgment.* Upon appeal from a judgment the record must contain the judgment roll, as prescribed by statute, and such other orders or papers as have been

made by order of court, a part thereof, including such order. The same shall be securely fastened together in chronological order and must be duly authenticated by the clerk of the District Court.

(B) *From Orders.* Upon appeal from an order, the original papers used by each party on the application therefor, the stenographer's minutes, if any, duly transcribed, and the evidence upon which such order is based, duly certified as correct by the trial judge, shall be filed, duly authenticated, and transmitted by the clerk of the District Court.

Whenever, for any purpose, copies of papers in the judgment roll or record are required, pursuant to order of the District Judge, to be transmitted instead of the original, such copies must be plainly typewritten, double spaced, and on good paper with the pages thereof consecutively numbered.

**RULE 20. PERFECTION OF APPEAL AND RETURN OF RECORD.** An appeal is deemed perfected, in civil cases, upon both the service and filing of a notice of appeal, with undertaking on appeal, when required, and in criminal cases, upon service and filing of a notice of appeal.

The clerk of the District Court shall cause the proper return to be made and the same, together with the statement of the case, if any, to be transmitted to and filed with the clerk of the Supreme Court, within fifteen days after the appeal is perfected, unless, by order of the trial court, made upon the application of any of the parties, such return shall be stayed for purposes of the appeal for an additional time, not exceeding forty-five days.

**RULE 21. SETTLEMENT OF CASE.** The statement of the case in all civil actions and proceedings may be prepared and settled as provided by statute. In case of death, disqualification, removal or absence from the state of the trial judge, the statement of the case may be settled, signed, and certified by and before another district Judge in the Judicial district; otherwise, application may be made to the Supreme Court as provided by statute.

**RULE 22. TRANSCRIPT IN CIVIL CASES; HOW PREPARED.** The party desiring to appeal, or to review for any purpose, the proceedings of the trial court, shall procure from the official court reporter a trans-

cript of the evidence and the proceedings had, duly certified by him as a true and correct transcript of the original shorthand notes and testimony taken and proceedings had upon the trial of the action. Such transcript shall consist of five copies carefully and legibly typewritten upon plain white or yellow paper of good texture, so that annotations may be made thereupon, with pen and ink. The sheets, typewritten on one side, shall be  $8\frac{1}{2}$  by 11 inches, in size, consecutively paged, and the lines numbered on the left hand margin thereof. Such typewritten page shall be double spaced, made with black or purple ribbon or carbon, containing not more than thirty nor less than twenty-five lines, with a margin on the left of not less than  $1\frac{1}{4}$  inches. Such transcript shall be securely bound on one side through the covers and shall have a complete index stating therein where may be found the exhibits, aptly described, the examinations of each of the witnesses and the orders and proceedings of the trial court.

**RULE 23. TRANSCRIPTS IN CIVIL CASES; TIME OF PREPARATION AND SERVICE.** Such transcript shall be prepared by the official court stenographer within fifteen days after the same has been ordered and proper deposit made therefor, unless the trial court by order, in writing, filed with the cause shall extend such time. The party desiring such transcript, shall pay to the official court reporter, or deposit with the clerk of the District Court, at the time of making the order therefor, not less than 25% of the estimated cost thereof, as given by such reporter. In cases of dispute, the trial court shall regulate or otherwise designate the amount of such deposit so to be made. Such transcript shall be served upon the opposite party within the time provided by statute and the opposite party likewise, within the statutory time shall serve any amendment desired. Thereafter, the trial court, after due notice of the settlement of the proposed case shall thereupon settle the transcript according to the facts of the case, and certify that the same is a true and correct settled case, and statement of the evidence and proceedings had.

**RULE 24. TRANSCRIPT AND CASE IN CRIMINAL CASES.** In criminal cases, the party desiring to appeal, or, to review the proceedings of the trial court, shall procure and serve a transcript of the evidence for settlement in the same manner as hereinbefore prescribed in civil cases.

He shall also prepare and cause to be served and settled, a statement of the case as prescribed by statute in criminal cases.

**RULE 25. PREPARATION AND TRANSMISSION OF THE RECORD OR JUDGMENT ROLL IN CIVIL CASES.** Upon appeals, in civil cases, the record or judgment roll shall be prepared and transmitted to the Supreme Court as provided by statute. The provisions of this rule also apply to mandamus and other special proceedings so far as applicable.

**RULE 26. PREPARATION AND TRANSMISSION OF THE RECORD OR JUDGMENT ROLL IN CRIMINAL CASES.** Upon appeal in criminal cases, the judgment roll or record shall be prepared and transmitted to the Supreme Court as provided by statute.

**RULE 27. PREPARATION OF RECORD IN CASES TRIABLE DE NOVO.** In all civil actions triable by the District Court without a jury where the party appealing or desiring to review the proceeding, demands a trial de novo, in the Supreme Court, a statement of the case shall be settled in the manner hereinbefore prescribed for civil actions. If the appellant desires a review of the entire case in the Supreme Court he must so specify. If he desires a review of any particular facts, the specifications must state the particular facts upon which a review is desired. If any material evidence has been excluded, of which the appellant complains, he must also specify distinctly and concisely the respects in which such evidence is material, without argument or citation of authorities. Such specifications shall be particularly made with reference to each and every portion of material evidence claimed to be so excluded. Upon the presentation of the statement of the case to the trial court, he shall review the specifications concerning the materiality of the evidence and, if deemed well taken, shall order such further proceedings to be had either upon new trial, or by means of taking additional testimony, so that the material evidence, deemed excluded improperly, may be adduced.

Otherwise, the trial court shall specifically review or overrule, by an order in writing and filed in the case, the specifications so made in that regard. Where upon appeal, it is made to appear that the trial court improperly excluded material evidence upon the issues, this court may direct a return or remand of the cause to the trial court for the

purpose of taking additional testimony, as if upon a new trial, and thereafter, proceedings shall be taken after a re-determination of the cause by the trial court, the same as in any other cause upon appeal.

In these rules the term, "trial court" has reference to the District Judge before whom the cause was heard, or determined.

**RULE 28. APPLICATION FOR WRIT OF HABEAS CORPUS.** When, upon application for a writ of habeas corpus, it is apparent that no necessity exists for its immediate issuance, and a district court or judge thereof has entertained an application for the writ, and, upon hearing, quashed it, this court will require all the papers, including the application and supporting affidavits, the return and supporting affidavits, and the order of such lower court, to accompany the application made to this court. In emergency cases the above requirement may be waived.

**RULE 29. WHEN STATE IS A PARTY. ATTORNEY GENERAL SERVED.** In all appeal cases in which the state is respondent, and in which the Attorney General is required by law to represent the state, the notice of appeal and briefs shall be served upon the Attorney General, and in criminal cases or where a county is a party, the notice of appeal and briefs shall also be served upon the State's Attorney of the proper county.

**RULE 30. ATTORNEY'S CERTIFICATE OF CLERKSHIP.** It shall be the duty of attorneys in this state, with whom students shall commence a course of legal study, to file a certificate to that effect in the office of the clerk of the Supreme Court. Such certificate shall state the time when such legal study commenced and the proposed course of study to be pursued. Such period shall be deemed to commence from the time of such filing and shall be computed by the calendar year.

**RULE 31. APPLICATIONS FOR ADMISSION TO PRACTICE LAW UPON EXAMINATION.** All applications for admission to practice as attorneys and counselors at law, upon examination, shall be made as provided by law. (Sec. 790 C. L. 1913.)

**RULE 32. EXAMINATION OF APPLICANTS BY THE STATE BOARD OF BAR EXAMINERS.** All applicants for admission to practice as attorneys or counselors at law, who do not seek to be admitted as attorneys

upon motion, shall be examined by the State Board of Bar Examiners, concerning their legal and moral qualifications as may be made to appear from their respective applications and an examination conducted by such board.

**RULE 33. ADMISSION TO PRACTICE LAW AFTER EXAMINATION.** Applicants for admission to the Bar upon examination may be admitted to practice as attorneys and counselors at law in all the courts of this State by the Supreme Court, either in regular or special session, upon the report of the State Board of Bar Examiners.

**RULE 34. ADMISSION OF ATTORNEYS TO PRACTICE UPON MOTION.** Applications for admission to practice as a resident attorney of this state may be received pursuant to Sec. 792 C. L. 1913.

Such application shall be upon written motion made by a member of the bar of this court, and filed with the clerk; and with such motion shall be filed the applicant's certificate of admission to practice in the foreign state and his affidavit, which shall disclose the place or places where he has practiced law in such foreign state, for a period of more than three years, in the aggregate. He shall also give the name and postoffice address of one or more of the district or circuit judges, who have presided during said time, in the court before which he has practiced. Where possible, he shall present the certificate of such judge showing the above facts in support of his application. The affidavit of the applicant shall also disclose whether any proceedings in disbarment or suspension of his license to practice are pending against him, or were pending at the time of his removal from the foreign jurisdiction, and, that he is still an attorney at law in good standing in such foreign state.

The applicant must also furnish the affidavit of at least two practicing attorneys of the foreign state who were fellow practitioners with the applicant, stating that the applicant is of good moral character, and a proper person to be licensed to practice law.

Such application shall thereupon be referred to the State Bar Board who shall investigate such application, and its sufficiency, including the moral qualifications of the applicant. Upon the report of the State Bar Board in regard thereto, motion for admission upon such application may be made at any regular or special term of this court.



Provided, however, that any member of the bar of another state, actually engaged in a cause or matter pending in this court, may appear in, or conduct said cause or matter while retaining his residence in another state.

**RULE 35. DISBARMENT.** Whenever any written complaint is made and filed with the clerk of this court charging any member of the Bar of this State with conduct warranting a disbarment or suspension as an attorney at law, the same shall thereupon be referred by the clerk to the State Bar Board for investigation, and report to this court concerning further proceedings to be had. Disbarment proceedings may also be instituted and prosecuted as otherwise provided by law.

**RULE 36. CASES MAY BE DISMISSED FOR FAILURE TO COMPLY WITH RULES.** A failure to comply with any of the requirements contained in these rules within the time or in the manner therein provided shall constitute grounds for dismissal of the appeal, for an affirmance, or for the imposition of terms, as the case may demand.

### ORDER ADOPTING RULES OF PRACTICE.

IT IS ORDERED, That the above and foregoing rules of practice be and the same are hereby adopted as the rules of practice of the Supreme Court of North Dakota. Until abrogated or modified, said rules shall govern the practice of this court in connection with existing statutory provisions of law applicable. The Clerk of this Court is directed to spread these rules upon the minutes of this Court. The Reporter is directed to prepare a suitable index for such rules and cause the same to be published in the Northwestern Reporter, the North Dakota Reports and in pamphlet form.

IT IS FURTHER ORDERED, that these rules shall take effect and be in force from and after August 15th, 1920.

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### CLERK'S CERTIFICATE.

IN SUPREME COURT,  
STATE OF NORTH DAKOTA. }

I, J. H. Newton, Clerk of the Supreme Court of North Dakota, do

hereby certify that the above and foregoing rules of practice for the Supreme Court of the State of North Dakota are true and correct copies of such rules of practice, as adopted by the Supreme Court, at a regular session thereof, held at the Capitol, June 26th, 1920.

WITNESS: My hand and the seal of the said Court this 26th day of June, 1920.

(SEAL)

J. H. NEWTON,  
Clerk.

7

**THE DISTRICT COURTS OF NORTH DAKOTA**  
**1920**

**JUDGES IN THE FIRST JUDICIAL DISTRICT**

Hon. Chas. M. Cooley.....Grand Forks, N. D.  
Hon. M. J. Englert.....Valley City, N. D.  
Hon. A. T. Cole.....Fargo, N. D.

**JUDGES IN THE SECOND JUDICIAL DISTRICT**

Hon. C. W. Buttz.....Devils Lake, N. D.  
Hon. A. G. Burr.....Rugby, N. D.  
Hon. W. J. Kneeshaw.....Pembina, N. D.

**JUDGES IN THE THIRD JUDICIAL DISTRICT**

Hon. Frank P. Allen.....Lisbon, N. D.  
Hon. Fred J. Graham.....Ellendale, N. D.

**JUDGES IN THE FOURTH JUDICIAL DISTRICT**

Hon. W. L. Nuessle.....Bismarck, N. D.  
Hon. J. A. Coffey.....Jamestown, N. D.

**JUDGES IN THE FIFTH JUDICIAL DISTRICT**

Hon. Frank Fisk.....Williston, N. D.  
Hon. K. E. Leighton.....Minot, N. D.

**JUDGES IN THE SIXTH JUDICIAL DISTRICT**

Hon. Frank T. Lembke.....Hettinger, N. D.  
Hon. W. C. Crawford.....Dickinson, N. D.  
Hon. James M. Hanley.....Mandan, N. D.

# RULES OF PRACTICE OF THE DISTRICT COURTS OF NORTH DAKOTA.

## ARTICLE I.

### TERMS OF COURT

**SEC. 1. GENERAL TERMS.** The general terms of the District Court shall be held in each county in the several districts in the manner hereinafter prescribed.

**SEC. 2. SPECIAL TERMS**—The Special terms of the District Court in the several judicial districts may be held at such times as the respective judges thereof in conference may determine.

**SEC. 3. FIRST JUDICIAL DISTRICT; GENERAL TERMS.** In Barnes County, commencing on the first Monday in January, and the first Monday in June. (Sec. 751, C. L. 1913.)

In Cass County, on the first Tuesday of each month in the year except July and August, but a jury shall be called only for January, February, March, November and December Terms unless, in the opinion of the judges, there is sufficient business to demand a jury for any other term or terms, provided, however, that the court may, if deemed advisable, continue the jury called at the January term, as a jury for the February, or February and March terms, and the jury called at the November term, as a jury for the December term. (Ch. 167, Laws 1919.)

In Grand Forks County, commencing on the first Tuesday in each month excepting the months of August and September; but a jury shall not be called for any term unless, in the opinion of the judges, there is sufficient business to demand a jury; provided that the presiding judge may continue the jury called for any specific term as the jury for the next term, if the business of the court so requires. (Sec. 747, C. L. 1913.)

In Griggs County, commencing on the second Monday in May and the second Monday in November. (Sec. 751, C. L. 1913.)

In Nelson County, commencing on the second Tuesday in March, and the first Tuesday in November.

In Steele County, commencing on the third Tuesday in June and the third Tuesday in October. (Sec. 749, C. L. 1913.)

In Traill County, commencing on the first Tuesday in March and November.

**SEC. 4. SECOND JUDICIAL DISTRICT. GENERAL TERMS.** In Benson County, commencing on the first Monday in June and the second Monday in December. (Sec. 748, C. L. 1913.)

In Bottineau County, commencing on the second Monday in February, the fourth Monday in June, and the third Monday in November.

In Cavalier County, commencing on the first Tuesday in December and the second Tuesday in June.

In McHenry County, commencing on the second Monday in March and July and the fourth Monday in November.

In Pembina County, commencing on the first Tuesday in June and the first Tuesday in January.

In Pierce County, commencing on the second Monday in January and in June and the third Monday in October.

In Ramsey County, commencing on the first Monday in March and the second Monday in November. (Sec. 748, C. L. 1913.)

In Renville County, commencing on the fourth Monday in January and the second Tuesday in July.

In Rolette County, commencing on the third Monday in June and the first Monday in January. (Sec. 748, C. L. 1913.)

In Towner County, commencing on the third Monday in March and the fourth Monday in November. (Sec. 748, C. L. 1913.)

In Walsh County, commencing on the fourth Tuesday in June and in November.

**SEC. 5. THIRD JUDICIAL DISTRICT. GENERAL TERMS.** In Dickey County, commencing on the first Tuesday in March and in October. (Sec. 751, C. L. 1913.)

In Emmons County, commencing on the third Tuesday in May and December.

In LaMoure County, commencing on the second Tuesday in June and the first Tuesday in November.

In Logan County, commencing on the second Tuesday in March and the first Tuesday in October.

In McIntosh County, commencing on the first Tuesday in April and in November. (Sec. 750, C. L. 1913.)

In Ransom County, commencing on the third Tuesday in May and the first Tuesday in December.

In Richland County, commencing on the first Tuesday in January and the second Tuesday in June.

In Sargent County, commencing on the first Tuesday in February and in September.

**SEC. 6. FOURTH JUDICIAL DISTRICT. GENERAL TERMS.** In Burleigh County, commencing on the first Tuesday in each month excepting the months of August and September; but a jury shall be called only for the February, June and December terms unless in the opinion of the judges there is sufficient business to demand a jury.

In Eddy County, commencing on the second Monday in March and the first Monday in November.

In Foster County, commencing on the fourth Monday in February, and the second Monday in October.

In Kidder County, commencing on the second Tuesday in January and in July.

In McLean County, commencing on the first Tuesday in July after July 4th, and the third Tuesday in November.

In Sheridan County, commencing on the last Tuesday in May and the fourth Tuesday in October. (Sec. 752, C. L. 1913.)

In Stutsman County, commencing on the second Monday in June and the first Monday in December.

In Wells County, commencing on the third Tuesday in July and the fourth Tuesday in January.

**SEC. 7. FIFTH JUDICIAL DISTRICT. GENERAL TERMS.** In Burke County, commencing on the fourth Monday in October and the third Monday in July.

**In Divide County, commencing on the first Monday in January and the second Monday in June.**

**In McKenzie County, commencing on the third Monday in October and the second Monday in June.**

**In Mountrail County, commencing on the second Monday in November and the third Monday in July.**

**In Ward County, commencing on the second Monday in November, the second Monday in February, and the first Monday in July.**

**In Williams County, commencing on the fourth Monday in February, the first Monday in July, and the fourth Monday in November.**

**SEC. 8. SIXTH JUDICIAL DISTRICT. GENERAL TERMS.** **In Adams County, commencing on the third Tuesday in January and in June.**

**In Billings County, commencing on the second Tuesday in January and the fourth Tuesday in May.**

**In Bowman County, commencing on the first Tuesday in July, after July fourth, and the second Tuesday in November.**

**In Dunn County, commencing on the fourth Tuesday in May and in September.**

**In Grant County, commencing on the second Tuesday in June and the fourth Tuesday in October.**

**In Golden Valley County, commencing on the fourth Tuesday in January and the second Tuesday in June.**

**In Hettinger County, commencing on the third Tuesday in February and in October.**

**In Mercer County, commencing on the first Tuesday in June and the third Tuesday in October.**

**In Morton County, commencing on the first Tuesday in January, March and November.**

**In Oliver County, commencing on the second Tuesday in June and October.**

**In Sioux County, commencing on the fourth Tuesday in May and the first Tuesday in November.**

**In Slope County, commencing on the first Tuesday in June and October.**

**In Stark County, commencing on the third Tuesday in February, June, and November.**

**SEC. 9. TERMS FOR NATURALIZATION.** Terms for naturalization may be held in the Judicial Districts of the State at such times and in such manner as the District Judges, by order, may prescribe for their respective Districts. Naturalization proceedings will be conducted publicly and with a view of securing the interest and the attendance of both the bar and the citizens generally.

**SEC. 10. GENERAL PROVISIONS CONCERNING TERMS.** Whenever it shall appear to the District Judges of any District that there is insufficient business to warrant the holding of a general term in any county in their judicial districts at the time designated for holding the same, the judges may determine not to call a general term of court in such county. Likewise, such district judges, for their respective districts, may designate and call a special term of court whenever, for any cause, it is deemed proper for the expedition of causes pending.

Whenever, for any cause, a general term is discontinued or postponed, or a special term designated, the presiding Judge shall file an order therefor with the Clerk of Court of the County in which said general term is discontinued or postponed, or special term designated, and thereupon such Clerk shall give the notice required by the order to all attorneys of record in the causes affected by the pending calendar or call.

## ARTICLE II.

### CHAMBERS OF DISTRICT JUDGES.

**SEC. 1. CHAMBERS.** The locations of the chambers of the District Judges in each of the respective districts are herewith determined as follows:

(A) First Judicial District: In the cities of Grand Forks, Fargo, and Valley City.

(B) Second Judicial District: In the cities of Devils Lake, Rugby and Grafton.

(C) Third Judicial District: In the cities of Ellendale and Lisbon.



(D) Fourth Judicial District: In the cities of Bismarck and Jamestown.

(E) Fifth Judicial District: In the cities of Minot and Williston.

(F) Sixth Judicial District: In the cities of Mandan, Dickinson and Hettinger.

### ARTICLE III.

#### GENERAL RULES OF PRACTICE.

**RULE 1. PROCESS; SERVICE; ENDORSEMENT BY ATTORNEY.** On all process pleadings, or papers to be served, the Attorney, in addition to subscribing his name, shall add thereto the particular location of his place of business by city or town, by street number or otherwise.

**RULE 2. PROCESS, PLEADINGS AND PAPERS. NUMBERING AND PAGING.** In all process, pleadings or papers used in any proceeding the pages thereof shall be numbered.

**RULE 3. PROCESS, PLEADINGS OR PAPERS. SERVICE BY OTHER THAN SHERIFF.** Whenever a process pleading, order of court or other papers are served personally by a person other than the sheriff or person designated by law, the affidavit of service, when made, shall state that the person so serving is of legal age, and the particular time and place of making the service. It shall also state that the person making such service knew the person served to be the person named in the papers served, and the person intended to be served.

**RULE 4. MOTIONS, NOTICES.** Motions, except when otherwise properly made in open court, shall be accompanied by notice thereof, together with copies of the affidavits or other papers in support of the same, or otherwise particularly specifying papers in the action that have been served, or are on file. Such motions shall concisely state the grounds thereof.

**RULE 5. ORDER TO SHOW CAUSE.** Orders to show cause will ordinarily not be granted, where a motion will equally suffice. Applica-

tions for orders to show cause must generally be supported by such moving papers as are required for motions.

**RULE 6. RESTRAINING ORDERS. WHEN ISSUED.** Restraining orders, or orders to show cause in the nature thereof, will not be issued ex parte, or without a hearing, unless it shall be shown in the moving papers that such exigency or occasion exists as requires immediately the issuance of such order in order that the rights of the parties may be preserved.

**RULE 7. RESTRAINING ORDERS. ORDERS TO SHOW CAUSE. MOTIONS.** Upon the hearings of applications for restraining orders, or of orders to show case or motions, oral testimony will not be received unless the court shall otherwise direct; the moving party shall have the opening and closing of the argument.

Upon default of any party to appear the court shall nevertheless proceed to hearing or to dismiss, as the case may be.

**RULE 8. FILING PAPERS.** The summons, pleadings, motions and orders to show cause in any action shall be filed with the clerk of the proper court within ten days after the service thereof respectively. Failure to so file shall be grounds for a motion by the opposing party to compel filing and for the imposition of a motion fee absolutely of \$5.00 in favor of the opposing party.

No papers of any kind in any action shall be removed or taken from the files in the offices of the clerk without the written order of the trial judge, made and filed in the case.

**RULE 9. MOTIONS BEFORE TRIAL JUDGE.** All motions for a new trial, settlement of a proposed case, judgment non obstante, vacation or modification of orders, judgments, or other proceedings, shall be presented and heard before the judge before whom the matter was heard, considered or determined, unless for any reason such judge is unable to act.

**RULE 10. FORECLOSURE OF LIENS.** In all cases of foreclosure of chattel liens of any kind, foreclosure will be ordered only upon proof that the property or some part thereof is in existence, subject to execution and within the jurisdiction of the court.

**RULE 11. DEFAULT JUDGMENTS.** In divorce cases upon default, the testimony must be taken, transcribed and filed in the office of the clerk, at the expense of the producing party.

In default actions based on written contract obligations, the evidence shall be filed with the clerk before entry of judgment unless, pursuant to order the trial judge, a copy certified by the party producing the same shall be filed in lieu thereof.

**RULE 12. EXTENDING TIME.** Orders extending time within which to answer a pleading shall be granted only upon written application and cause shown therefor. Such application shall generally be accompanied by an affidavit of merits.

**RULE 13. STIPULATIONS.** All stipulations between parties or their attorneys, except those made in open court and read into the record shall be made in writing and filed with the clerk, in order to be effective.

**RULE 14. CASES AT ISSUE.** Whenever any case has been at issue, whether upon the calendar, or not, for three successive jury terms of the court, it shall be subject to dismissal, in the discretion of the trial court, upon motion of either party.

**RULE 15. CONTINUANCE. MOTIONS FOR; AFFIDAVITS.** All motions for continuance shall be made within the first three days of the term, unless cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day, and all affidavits for a continuance on account of the absence of a material witness or material evidence shall show to the satisfaction of the court, by the facts therein stated, that the applicant has used due diligence to prepare for the trial, and the nature and kind of diligence used, and the name and residence of the absent witnesses, and what he expects or believes such witness or witnesses would testify were he or they present and orally examined in Court, or the nature of any document wanted and where the same may be found, and that the same facts cannot be satisfactorily shown by other evidence. No counter affidavits shall be received on motions for continuance, unless otherwise ordered. No continuance shall be granted for the term except upon such terms and costs as the court may impose, and if terms and costs shall be imposed

the same shall be complied with and paid within such time as may be fixed by the Court after the making of the order, or such continuance shall not be had.

**RULE 16. TRANSCRIPTS IN MOTIONS FOR NEW TRIAL, OR OTHER PROCEEDINGS FOR REVIEW.** In motions for a new trial or other proceedings for review of any judgment, order or other proceedings of the court, a transcript of the evidence and the proceedings had, where required, shall be prepared by the official court stenographer within fifteen days after the same has been ordered, and proper deposit made therefor, unless the trial court by order, in writing, filed with the causes shall extend such time. The party desiring such transcript shall pay to the official court reporter, or deposit with the clerk of the District Court, at the time of ordering such transcript, not less than twenty-five per cent of the estimated cost thereof, as made by the court reporter, or in the event of any dispute, as settled by the trial court.

**RULE 17. CERTIFIED QUESTIONS OF LAW.** Pursuant to Chapter 2, Sess. Laws 1919, questions of law will be certified to the Supreme Court, only after the trial court has specifically ruled upon the question or questions to be certified, and then only when the court, in the exercise of its sound judicial discretion, shall determine that the same are doubtful, vital and principally determinative of the issues in the case; and when, further, it is made to appear that the same, when reviewed and determined by the Supreme Court will be determinative upon the issues and facts, and that such certification will not delay the final hearing and determination of the case. In such cases the court will determine, settle, adjudicate and certify distinct and formulated questions of law. It shall be the duty of the attorneys in the cause to submit to the court, for its consideration and determination, proposed questions of law, clearly and separately stated, not involving questions of fact or of mixed law and fact. There shall be presented so much of the record, including the pleadings, to the court for settlement and certification, as will clearly illustrate the application of the formulated questions of law to the issues involved in the case. Certification and settlement of the record and of questions of law shall be subject to the direction and order of the court, to the end that the questions involved

may be expeditiously presented to the Supreme Court. See *Stutsman County v. Dakota Trust Co.*, (N. D.)

....N. W.....; *Guilford School District v. Dakota Trust Co.*, (N.D.)

....N. W.....; *Clark v. Wildrose School District*, (N. D.) ....  
N. W.....

**RULE 18. FAILURE TO COMPLY WITH THE RULES.** Upon the failure of any party to comply with the rules herein specified, the court, upon motion therefor may grant relief as the circumstances require, together with costs.

### ORDER FIXING TERMS OF COURT, CHAMBERS, AND THE RULES OF PRACTICE FOR THE DISTRICT COURTS.

IT IS ORDERED, That terms of court and chambers, in the various judicial districts be and hereby are fixed and established as above indicated, from and after August 15th, 1920; and that the foregoing rules of practice be and the same are hereby adopted to take effect August 15th, 1920.

IT IS FURTHER ORDERED, that the foregoing be spread on the minutes of this court, and be suitably indexed and published forthwith.

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### CLERK'S CERTIFICATE.

IN SUPREME COURT,  
STATE OF NORTH DAKOTA. }

I, J. H. Newton, Clerk of the Supreme Court of North Dakota, do hereby certify that the above and foregoing terms of court, chambers and rules of practice for the District Courts of North Dakota are true and correct copies of such terms, chambers and rules of practice, as determined and adopted by the Supreme Court, at a regular session thereof, held at the Capitol, June 26, 1920.

WITNESS: My hand and seal of the said Court this 26th day of June, 1920.

(SEAL)

J. H. NEWTON,  
Clerk.

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